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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 959

C. R. UNDERWOOD, ET AL.,
Petitioners,

v.

KNOX GLASS BOTTLE COMPANY, ET AL.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI AND FOR SUPPLEMENTAL RELIEF.

WM. HAROLD COX,
GARNER W. GREEN, SR.,
809 Electric Building,
Jackson, Mississippi,
Counsel for Petitioners.

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v.

KNOX GLASS BOTTLE COMPANY, ET AL.,

Respondents

PETITION FOR CERTIORARI AND SUPPLEMENTAL RELIEF

Petitioners are, jointly and severally, C. R. Underwood, E. F. Underwood, J. H. Underwood, former officers and directors of Knox Glass Bottle Company (Knox of Mississippi), a wholly owned subsidiary of Knox Glass Bottle Company of Pennsylvania (Knox of Pennsylvania), Mrs. Florence P. Underwood, wife of C. R. Underwood, Miss C. Alberta Luter, E. F. Underwood, Trustee, J. H. Underwood, Trustee, and W. E. Hester, Jr., and E. F. Underwood, d/b/a Hutco, several lessors of trucks to Knox of Mississippi under standard form of contract.

Knox of Mississippi and Firemen Fund Indemnity Company, surety on the appeal bond, are respondents.

Opinions Below

1. The opinion of the Chancellor of Hinds County, Mississippi, dismissing the complaint is unreported.

2. The opinions of the Supreme Court of Mississippi on original hearing, being the highest court wherein such decision may be rendered, are not yet officially reported but appear in 89 So. 2nd 788, 830, 832.

3. The majority opinion on Suggestion of Error, by Chief Justice McGehee, Judges Hall, Kyle, Holmes, Ethridge and Gillespie, concurring; Roberds, Lee and Arrington, dissenting, is not yet officially reported but appears in 91 So. 2nd 843 (Adv. Sh.).

Jurisdiction

(i) The decree of the Chancellor was rendered upon June 10, 1955; the judgment of the Supreme Court was rendered October 8, 1956.

(ii) The Suggestion of Error was overruled on January 14, 1957; the Motion for transmission of original instruments and stay of mandate was overruled without opinion on March 18, 1957; and extension of time to file this petition and record to May 1, 1957, was granted by Mr. Associate Justice Black on April 1, 1957.

(iii) The statutory provision conferring jurisdiction is 62 Stat. 929 (Title 28, U.S.C.A., Sec. 1257). See, also, Supreme Court Rule 19, said decision being probably "not in accord with applicable decisions of this Court" as precedently rendered and, with deference, also hereasto "has so far departed from the accepted and usual course of judicial proceedings * * * as to call for an exercise of this Court's power of supervision."

Questions Presented

These questions, as herein stated, with deference, are more prolix than they normally would have been due to the complexities of this most remarkable litigation and the unexpected vagaries that arose therein:

I

Did the several Judges of the Supreme Court of Mississippi violate the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment of the Constitution by displacing applicable Pennsylvania sovereignty to impose under Mississippi law tort liability against directors of Knox of Mississippi when they were conforming to a policy prescribed by Knox of Pennsylvania, the owner of all the property, and the binding effect of Pennsylvania's laws hereasto was applied from May 25, 1946, to January 1, 1952?

II

Could three Judges, Gillespie, Holmes and Ethridge, in virtue of an alleged fiduciary relationship, annihilate petitioners' right to contract and vouchsafe to Knox of Mississippi the return of all rental paid, less depreciation and incidental expenses, by assuming to make of petitioners tort feasors, without violating the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution?

III

Could three Judges, Chief Justice McGehee, Judges Hall and Kyle, in virtue of said alleged fiduciary relationship, destroy petitioners' right to contract and vouchsafe to Knox of Mississippi the return of all rental paid, less depreciation and incidental expenses, by assuming to make of petitioners tort feasors after January 1, 1952, for not adopting a judicially declared policy but continuing that corporately determined appropriate, without violating the provisions of the Fourteenth Amendment?

IV

When petitioners had presented the Federal questions by their several suggestions of error, did not the majority

of the Supreme Court contravene the Due Process and Equal Protection Clauses of the Fourteenth Amendment when thereasto they declared, 91 So. 2nd 843 (Adv. Sh.) Abridged Record, p. 155:

> "Of the numerous questions argued in the several suggestions of error the most forceful one is based on the premise that the Court held in its original decision that the lease contracts were valid until Roy Underwood died. This premise is not correctly assumed. The majority of the Court did not consider, and did not hold, the leases valid prior to the death of Roy Underwood. It was held that under the peculiar circumstances of the case the appellant was estopped to assert their invalidity.
>
> "In our opinion none of the questions presented justify any change in our decision."

V

Was there not a violation of the Fourteenth Amendment under *Hovey* v. *Elliott*, 167 U.S. 409, 42 L.ed. 215, when the decree for petitioners, under the issues and under competent evidence, was assumed to be reversed for variant reasons severally assigned by the State Supreme Court Judges beyond the issues made in the Chancery Court and whereasto there was no appropriate proof or hearing, and when the Supreme Court denied to petitioners upon remand a full constitutional hearing in the Chancery Court as to the factors thus subsequently judicially integrated as to:

(a) All matters relevant in controversy.

(b) The sufficiency of the time between October 18, 1951, and the date whereat action had to be taken by the subsidiary officials whether to acquiesce in or renounce the policy of the parent corporation.

(c) A determination of a reasonable rental which petitioners were entitled to recover.

(d) Isolating Knox of Mississippi from the integrated Knox Empire and confusing the issue in the State Supreme Court by alleged misfeasance by Knox of Pennsylvania.

VI

Was there not a contravention of the Fourteenth Amendment, both Due Process and Equal Protection Clauses, when the majority of Mississippi's Court, as to a policy of over-the-road leasing existing for more than seven years, ex post facto judicially declared said leasing to be "manifestly erroneous"—"improper", considering that C. Horton Smith received precisely the same rental from 1946 to December, 1953 as was provided in petitioners' leases for the lesser time? Precisely similar rentals were paid to all lessors and similar allowances made to all who received delivery at the plant, published carload freight rates being made the basic factor in rent fixation.

VII

Was there not a violation of the Due Process and Equal Protection Clauses of the Federal Constitution when the State Supreme Court assumed to impose a several obligation upon J. H. Underwood as officer and director when he was not such from January 1, 1952, to March 2, 1952, the imposition being for amounts received as Trustee for Sandra Ann Underwood?

VIII

Was there an invasion of the Federal constitutional rights of Miss C. Alberta Luter when Mississippi's Court, as to alleged delinquencies, assumed to integrate evidence

excluded by the Chancellor and thereby impose upon her a liability after she had ceased to be an alleged fiduciary?

IX

Was the ruling of the assumed majority of the Supreme Court of Mississippi that petitioners were jointly and severally liable as tort feasors to respondent for all profits received by petitioners after January 1, 1952, by virtue of the truck leases so *arbitrary and capricious* as to be violative of the Constitution as set forth in Section (d) hereof, especially in the following aspects:

1. By imposing such tort liability upon petitioners in disregard of all the competent evidence showing that these minor officials of the Knox empire were wholly under the control of the parent corporation and powerless to disobey either the supervision purchased from it or its fixed policy against truck ownership and in favor of leasing from minor executives as a business incentive, especially when all lease contracts made were uniform and their terms fair, just and reasonable and were for an adequate number of trucks with an allocation of these leases to such employees as were approved by Roy R. Underwood, who had not only full knowledge of all extraordinary returns potentially derivable therefrom, but likewise a broad comprehension of the business necessities of the Knox empire and that essential for the conservation thereof.

2. By invalidating contracts lawfully made between respondent and petitioners and imposing, in contravention of said contracts, disastrous tort liability in spite of the overwhelming evidence of the fairness of said contracts and their validity, state power not being judicially able to metamorphose definite contract right

inter partes into tort liability fundamentally variant, against additional parties.

3. By striking down as "manifestly erroneous" the admittedly good faith decision of the parent corporation against truck ownership and in favor of over-the-road leasing.

4. By denying to petitioners any return whatsoever for the use of their property except depreciation and other deductible expenses, and especially reversing decree for rent from November 1953, to February 23, 1954.

5. By refusing to recognize the validating effect under the law of the State of Pennsylvania of the ratification of these contracts by the stockholders of the parent corporation after full knowledge of the facts.

6. By invalidating said lease contracts after the arbitrarily fixed date of January 1, 1952, when there was neither hearing nor evidence showing any distinction between the period before that date, wherein said leases were upheld, and the period thereafter, when said leases were struck down as criminal. (Emphasis ours unless otherwise noted.)

Constitutional Provisions Involved

1. That segment of the Fourteenth Amendment to the Constitution of the United States wherein it is provided:

> " • • • nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. The Fifth Amendment vouchsafed efficacy as a part of the Bill of Rights whereunder it is provided:

> "• • • Nor shall private property be taken for public use, without just compensation."

But note *Breithaupt* v. *Abram*, 352 U. S. ——, 1 L. ed. 2nd 448 (Adv. Sh.).

3. The Full Faith and Credit Clause, Article IV, Sec. 1:

"Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. * * *."

4. Article I, Section X, which provides:

"1. No State shall * * * pass any * * * Law impairing the obligation of Contracts, * * *."

We are conversant with *Central Land Co.* v. *Laidley*, 159 U. S. 103, 40 L. ed. 91, but note, quoad Mississippi, *Wisconsin Lumber Co.* v. *State*, 97 Miss. 571, 54 So. 247.

Statement of the Case

The crux of this case is the extent of the limitation upon the power of a State to interfere with the liberty of contract, arising, however, herein from interference with the internal affairs of a corporation—the question of how far the courts may supersede corporate management to strike down corporate contracts and a course of action duly approved and ratified by all concerned over a period of seven years.

This is a bill for accounting filed by respondent (Knox Glass Bottle Company, a Mississippi corporation and the wholly-owned subsidiary of Knox Glass Bottle Company of Pennsylvania) against petitioners in the Chancery Court of Hinds County, Mississippi. The claim for general accounting was abandoned and respondent confined its claim to monies earned by the trucks of petitioners while leased to respondent.

Knox of Pennsylvania was the parent and dominant corporation in the Knox glass empire of sixteen corporations,

but was not a party to the suit and its operations were not in issue. From 1934 to October 16, 1951, when he died, Roy R. Underwood was entrusted by the stockholders of the parent corporation with "full, complete and unlimited power of attorney to vote all of the stock * * *" of the subsidiaries. "* * * it is clear that these Board of Directors (of both Knox of Pennsylvania and Knox of Mississippi) served only in a perfunctory manner, leaving unto Roy R. Underwood that matter of making all major decisions concerning the operation of the Knox plants", Abridged Record, p. 64. Roy R. Underwood was the czar of the empire and a genius in the glass business who saw the Mississippi investment grow from less than $100,000 to a property worth millions. He was in control of the Mississippi subsidiary by daily telephone and mail contact. His brother, C. R. Underwood, was then the active manager of the respondent, subject to his control. His nephews, E. F. Underwood and J. H. Underwood, were, respectively (after 1941) vice-president and director of Respondent, and (after March 1, 1952) vice-president and (after May, 1952) director of respondent. Roy R. Underwood owned slightly less than one-third of the shares of Knox of Pennsylvania.

Basically, this case involves the liability vel non of respondent, Knox of Mississippi, alone, for an agreed rental on trucks owned by petitioners and used by respondent in its glass manufacturing business from which it derived profits annually amounting to "many thousands of dollars", A.R. p. 71, (in the words of the trial court) for the years 1946 to February 23, 1954. The rentals were incurred under written lease contracts between the parties all in identical terms. A.R. p. 26 and p. 53. Respondent paid such agreed rentals on said lease contracts until November 1, 1953. Some of the petitioners, who were officers and directors, re-

signed November 23, 1953 (except E. F. Underwood, who held slightly longer). The respondent continued to use petitioners' trucks in its business until February 23, 1954. On January 6, 1954, the reorganized company cancelled all of said leases by letter to each petitioner, identical in form (A.R. p. 61), and petitioners acceded thereto; and said leases were cancelled under the terms thereof at the end of the monthly lease period. Respondent refused to pay the rentals on said trucks from November 1, 1953, to February 23, 1954, although it sent petitioners credit memoranda showing the company liable to petitioners in the amount provided in the lease contracts therefor. On the trial it was agreed by counsel for respondent that petitioners were entitled to the amount awarded them by the trial court if they were entitled to anything under said leases. A.R. p. 57.

The respondent sued petitioners to recover all rentals paid by it to petitioners for the use of these trucks, which trucks respondent alleged belonged to it. The petitioners cross-sued respondent to recover the unpaid rentals due them on their trucks which they contended belonged to them. The trial court heard this case for an entire month and rendered an elaborate opinion in which it reviewed the facts and made its conclusions of law to the effect that respondent was entitled to no relief on its bill of complaint; and that petitioners were entitled to recover the agreed rental on these trucks. All of the facts in this case—*unchallenged on appeal to the Supreme Court of Mississippi*—are well epitomized in the comprehensive findings of fact and conclusions of law contained in the opinion of the trial court in this case, inserted in the abridged printed record (herein designated "A.R.") p. 63, by petitioners for more ready access thereto by this Court and reprinted as Appendix "A" hereto. The numbers of the trucks, the dates of the leases, the lessors, and other relevant facts have been com-

piled into a schedule inserted in the appendix to the Abridged Record, for which we vouch.

The factors which motivated R. R. Underwood as the guiding genius in his corporate policy determination, that, in the manufacture of glass, there should be not company ownership of trucks, but separate, independent leases from employees, both fiduciary and non-fiduciary, does not herein appear and can never be accurately ascertained, for he has passed; but he, as the presiding genius of the empire, assumed to know better than anyone else that requisite for its success, especially that which would appropriately stimulate its employees in production, and fixed as just and reasonable rent the published carload freight rate. With all of these factors then admeasured by this outstanding man, he determined "as a matter of policy that the company should not purchase and own any trucks. He was opposed to it operating its own trucks, for the purpose of hauling its wares to its customers and making return hauls of property of others. He considered that it was preferable for the company to use its available funds in its glass manufacturing operations" (89 So. 2nd 807, Appendix "B," A.R. p. 91). The Court will perceive that the rental was uniform to C. Horton Smith (who verified the bill for respondent) and his associates and the wrongfulness consisted in the alleged exaggerated amount paid therefor under the policy; but the amount paid to the petitioners, whereasto this complaint is, was not a cent greater than the amount whereasto no complaint has assumed to be made. In short, that which was sauce for the goose is not to be sauce for the gander, the sole differentiation being in the relationship to those in the proxy battle. Roy R. Underwood *"was the policy-maker by the consent and acquiescence of the stockholder, Knox of Pennsylvania,* and he was the man who decided and established the Knox policy against company ownership of over-the-road trucks. *Nor*

does the evidence indicate that this decision was affected by any bad faith or fraudulent purpose on his part. It was a business-judgment decision which, although manifestly erroneous, was the fixed and undisputed policy of this chief executive of the Knox companies" (89 So. 2nd 816, Appendix "B", A.R., 108).

"Moreover, knowledge of the truck leases by Roy R. Underwood was full and undisputed. He required Knox of Mississippi to furnish him, as president of Knox of Pennsylvania, monthly 'clipper reports' of the truck operations. These were prepared by the traffic department of complainant and a copy was sent each month to Roy's office in Knox, Pennsylvania. These reports listed each truck, both company-owned and leased, and reflected the costs of operation and net revenues realized. These clipper reports came directly to the attention of Roy R. Underwood, and there was considerable correspondence between him and C. R. Underwood, much of which is in the record, about the leased trucks. The correspondence reflects that Roy was kept closely advised of all phases of the trucking operation. On April 8, 1950, he wrote: 'I appreciate that we do not want to make capital expenditures for additional truck equipment at this time'. On March 19, 1951, he wrote: 'I observe that you are operating fourteen trucks under lease and nine trucks under ownership.' * * *." (89 So. 2nd 817, Appendix "B", A.R. 108).

Roy R. Underwood never, personally, had any interest in any truck leased.

Originally, the great bulk of the product of respondent was delivered by common rail carrier; later, a substantial portion was by common motor carrier; and finally, in the period of complaint, there were both company-owned trucks and leased trucks. Throughout all this time, the ratio between gross sales and freight "remained substantially constant" according to the Supreme Court, notwithstanding the dou-

bling of the cost of transportation during the same period. The Chancellor found that leasing saved many thousands of dollars for respondent, for many loads were of less than carload size with the rates for drop shipments of one hundred pounds being less than those administratively approved for either contract or common truck carriers. The Chancellor further found evidence of fairness in the use of respondent-owned trucks together with leased trucks on a "first in, first out" basis and the allowance by respondent to their pick-up customers of a discount equivalent to the leased carrier rental (not including back-haul). No decision as to management made by Roy R. Underwood in this empire was ever reversed by the corporation, and it rested with these six members of Mississippi's Court to do that which the corporation had consciously not only left undone but approved. Knowing all relevant facts, both those disclosed by the opinion of the Court and doubtless many others, he determined against company ownership of trucks and in favor of leasing from those connected with the company. As was appropriately said by the majority opinion, by the middle of 1948 "it was obvious that large profits were being made by the trucks". These large earnings were known from the plant level up, but Roy R. Underwood took the flat position that truck ownership by Knox of Pennsylvania, through Knox of Mississippi, was not to be, and that the additional trucks essential for glass delivery were to be leased upon the fixed basis from lessors approved by him. Prior to his death, substantially all of the petitioners having leases were approved by him as appropriate, embracing fifteen units. Only four trucks were leased after his death by some of the petitioners.

We desire to stress:

1. " * * * as showing conclusively the esteem and regard in which Roy was held by the officers and stockholders of

complainant corporation, these officials after his death, established a trust of one hundred thousand dollars for the benefit of his widow." (89 So. 2nd 833, A.R., 136).

2. Knox of Pennsylvania borrowed $3,000,000 as at June, 1952, executing therefor a mortgage whereby it was compelled to pay interest charges of from seven to nine percent (89 So. 2nd 835, A.R., 140), and wherein it was forbidden to purchase trucks.

3. "And to show conclusively the Pennsylvania Corporation * * * had exclusive control and management of the Mississippi Corporation, it is shown that the Mississippi Corporation paid to the Pennsylvania Corporation two thousand dollars per month for service of the parent corporation in managing and directing the affairs of the Complainant corporation." And in addition note the sundry and various amounts imposed in one year, amounting to $122,018.97 (89 So. 2nd 835, A.R., 139).

4. " * * * the Court finds as a matter of fact, that those now in power and control of the Knox empire constitute another family group and close friends of that family group who own the controlling stock in the parent corporation, Knox of Pennsylvania, and that these people knew, or should have known had they opened their eyes, at the time of Roy R. Underwood's death and shortly thereafter when they elected to the Presidency of said parent corporation and the complainant corporation, C. R. Underwood, that the vast majority of the truck leases in question were then in existence and that the defendants were realizing a profit from such leases". (Opinion of the Chancellor, A.R. 75).

5. During four of the years in controversy, earnings from the leasing plan were adequate to vouchsafe Smith, as sales executive, commissions of approximately $425,000.

6. Each lease was several and separate and Mississippi's majority did not undertake to fix a reasonable rental value for the trucks used, if such power were possessed, fixing

as the admeasurement of right depreciation alone plussed by personal taxes.

7. The rental payments severally made were the liquidation of individual obligations voluntarily made whereasto other parties were strangers.

The first such lease was executed May 25, 1946, from J. G. Smith and C. H. Smith (now senior vice-president), and rent thereon in precisely the same amount as was paid to the petitioners was collected. The same is true of the lease by J. M. Patten and by DeViney (now junior vice-president). No objection whatsoever was voiced at any time by Roy Underwood as to the amount of this rental, or the equivalent customer discount. A lease was continued as to a half unit in favor of an employee's widow until September 1954 by the reorganized group. In addition, the majority opinion held that W. E. Hester, Jr., a co-partner, was entitled as per this lease contract to recover the one-half rental due thereunder, and therefor the judgment was affirmed in the Supreme Court, and Knox of Mississippi did not appeal. This judicially established that the rental per se was contractual—just and reasonable. This adjudication operated substantially as a collateral estoppel under *Cromwell* v. *Sac County*, 94 U.S. 351, 24 L. ed. 195. As shown by the Court's opinion, C. R. Underwood, on behalf of Knox of Mississippi, purchased Trucks Nos. 7, 8 and 9 and he was therefor reprimanded by Roy R. Underwood for policy violation.

Petitioners' lease contracts were changed slightly on November 23, 1953, by integrating an additional term, (A.R. p. 63) and these contracts remained in the possession of Knox of Mississippi until after possession had been taken by the reorganized directors; and DeViney mailed these contracts of lease to the petitioners as lessors, respectively thereto entitled, on December 18, 1953. Delivery was made

of these leases when no Underwood was a director or an officer in Knox of Mississippi or Knox of Pennsylvania (except E. F. Underwood). The contractual terms whereon petitioners rely are substantially uniform and appear in A.R., pp. 26, 53.

Upon January 6, 1954, C. Horton Smith, acting for the reorganized directorate as senior vice-president, wrote in part as follows (notwithstanding the action of DeViney, as junior vice-president, in making delivery of this lease after November 23, 1953, on December 18, 1953), A.R. p. 62:

> "You are further notified that it is the will and desire of this corporation that said purported lease agreement and any agreement covering said equipment be terminated as of this date, and you are hereby tendered the immediate possession of said equipment and the same will be made available to you at the plant of Knox Glass Bottle Company, in Rankin County, Mississippi, when and as requested by you *or as soon thereafter as possible.*
>
> "Said purported agreement provides that the lease of said equipment *is for a period of six months, subject to 30-day cancellation notice by either party.* Unless you are agreeable to an immediate termination of said purported agreement as above set forth, *then you are hereby notified and said purported agreement is hereby cancelled as of February 23, 1954*, said date being the end of the monthly term as provided by said purported agreement and the first such term end more than thirty days from this date."

The petitioners were unwilling thus to forthwith accept the tendered leased property and so advised Knox of Mississippi, but permitted the lessor-lessee relationship, pursuant to said notice, to expire on February 23, 1954, lessee

having asserted specifically the right under the leases thus to do.

In the original bill, there were integrated divers averments of flagrant fraud as to the petitioners. Appropriate denials were made and the case was tried upon these issues. Chancellor Pyle dismissed the original bill and granted relief in favor of petitioners on the cross-bills, respectively. The Supreme Court, on issues not previously raised, divided most remarkably: (1) Judges Ethridge, Holmes and Gillespie held no contract was permissible between 1946 and 1954, but thereasto absolute tort liability existed; (2) Chief Justice McGhee and Judges Hall and Kyle held there was no right to contract and tort liability existed after January 1, 1952, but prior to that date there was an estoppel, under "peculiar circumstances" not clearly defined; and (3) Judges Lee, Roberts and Arrington held that the contracts of lease were valid and the right to contract existed. Judge Lee held that when C. R. Underwood became President of Knox of Pennsylvania, the individual contracts, those from his wife and his grandchildren should have been by him surrendered, but that as to the other parties the contracts were valid. Judges Roberts and Arrington held that the contracts were valid until March 15, 1953, when a letter was written by P. H. Eager, attorney for Knox of Mississippi, and that after the date of this letter two new contracts in favor of C. R. Underwood had to be ratified, but that the two others were valid. These three Judges did not consider nor express any opinion as to the fact that in November 1953 these leases were re-written before the change in the regime, and after the change, delivered by DeViney, the new junior vice-president, and then cancelled by C. Horton Smith, the new senior vice-president.

Comparison of the opinion of the majority of the Supreme Court of Mississippi with the opinion of the Chancellor is

necessary to visualize the extent to which the Supreme Court departed from its jurisdiction to make independent findings of fact.

The extent of these departures from fact is especially arbitrary with regard to the propriety of the leases and their ratification, attention being especially directed to the adjourned stockholders meeting of Knox of Pennsylvania on April 14, 1953 (AR p. 151). At that meeting, there was a consideration of the Treasurer's report, consisting in part of an audit revealing and tacitly approving the rental paid to petitioners; and the stockholders then and there approved and ratified all the acts of all officers for the preceding year.

Certiorari is sought to protect the constitutional right to contract which otherwise, with deference, has substantially been destroyed.

The Federal Questions Were Appropriately Presented and Adversely Determined

Each petitioner appropriately, in the several suggestions of error in the Supreme Court of Mississippi, invoked the Federal Constitution as to the crucial question of lease-contract validity as appears at page 55, et seq., of the Suggestion of Error of William Harold Cox, Esquire, on behalf of C. R. Underwood, Mrs. Florence P. Underwood and Miss C. Alberta Luter, wherein it was declared:

> "Any presumptions of unfairness which might be indulged in this case are completely dispelled and dissipated by positive and uncontradicted evidence of perfect fairness in these leases. Everybody else, Horton Smith, H. B. DeViney and Slew Hester, had perfectly valid leases all the time on their equipment to appellant, and it follows, as the night the day, that the same leases containing the same terms and conditions at the same time with each of these appellees was and is like-

wise perfectly valid. Any rule to the contrary, whether by enactment of the Legislature or by judicial fiat, is necessarily arbitrary and capricious and void under Article I, Section 10, and the Fourteenth Amendment to the Federal Constitution. There is simply no such thing as one law for the Underwoods and another law for everybody else in this case."

And in the conclusion therein set forth, pp. 61, 62:

"* * * With great deference and earnestness, it is urged on behalf of C. R. Underwood, Mrs. Florence P. Underwood and Miss C. Alberta Luter that the Final Judgment or Final Decree of this court on this appeal contravenes and impinges upon Article I, Section 10, and the Fourteenth Amendment to the Constitution of the United States for the reasons and in the respects stated."

See, also, A.R., 147.

In the Suggestion of Error of Vardaman Dunn, Esquire, on behalf of E. F. (Dick) Underwood, at page 46, it is said:

"Article I, Section 10, prohibits a state from impairing the Obligation of Contracts. Article XIV prohibits the taking of property without due process of law.

"The judgment of this Court has undertaken to impair the Knox obligation assumed by Knox, as to the leases executed prior to the death of Roy Underwood, and has imposed upon E. F. Underwood an affirmative duty to have renounced and cancelled that which accrued to him thereunder. It has impaired the obligation of contracts for the benefit of the children of the trust estate. In doing this, the Court has created a power and authority in E. F. Underwood to act where none such, in fact existed. It has stricken down valid con-

tracts and has refused to recognize the obligations thereof.

"Due process of law has been denied in the taking of property without authority under the law of the land and compensation therefor has been denied."

And in the conclusion, pp. 47, 48:

"Although Dick, regardless of anyone else, acted in good faith and in reliance upon the expressed will of the parent, Knox, first under Roy and then under C. R., he is being penalized beyond comprehension. He is not only called upon to return rentals received by him (both individually and as trustee) indirectly as a HUTCO partner, but he is being called upon to return those received for the minor children and those received by Miss Luter and others. All of this is being decreed with no allowance whatever for any 'reasonable'' compensation for the use by Knox of these properties."

And in the Suggestion of Error of Leon Hendrick, Esquire, on behalf of other petitioners in the supplemental Suggestion of Error, there has been integrated that hereinabove said by adoption. Having so done, thereto the majority opinion responded, 91 So. 2nd 843 (Adv.Sh.):

"Of the numerous questions argued in the several suggestions of error the most forceful one is based on the premise that the Court held in its original decision that the lease contracts were valid until Roy Underwood died. This premise is not correctly assumed. The majority of the Court did not consider, and did not hold the leases valid prior to the death of Roy Underwood. It was held that under the peculiar circumstances of the

case the appellant was estopped to assert their invalidity.

"In our opinion none of the questions presented justify any change in our decision."

It was not until the majority opinion was herein rendered that there was any intimation that there would be a transgression of the Federal Constitution, but there was and has been; and, so being, the law is well-settled that when the Federal questions are first raised in the appellate court, and before that date there was no opportunity to thereasto assign them, an assignment at that time is appropriate and proper. *Saunders* v. *Shaw*, 244 U.S. 317, 61 L.ed. 1163; *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673, 74 L.ed. 1107; and *Fleming* v. *Fleming*, 264 U.S. 29, 68 L.ed. 547. Compare *Herndon* v. *State of Georgia*, 295 U.S. 441, 79 L.ed. 1530.

Thus, Mississippi's Court, without original jurisdiction, judicially treated petitioners just as though they had been and were in contempt of Court and denied to them the hearing which the Constitution vouchsafed as to the matters specified in Question V. *Hovey* v. *Elliott*, 167 U.S. 409, 42 L.ed. 215, reiterated in *National Union of Marine Cooks & Stewards* v. *Arnold*, 348 U.S. 37, 99 L.ed. 46.

The judgment appealed from is final. When petitioners moved in the Supreme Court of Mississippi for a stay (A.R., 156), the respondent contended that this judgment was not final, citing *Republic Natural Gas Co.* v. *Oklahoma*, 334 U.S. 62, 92 L.ed. 1212, which is not controlling because:

(a) The Chancellor awarded a monetary recovery against Knox of Mississippi in favor of petitioners. Therefrom it, respondent, Knox of Mississippi, appealed and the Supreme Court of Mississippi reversed Chancellor Pyle and dismissed the crossbill as to these amounts so thus awarded, save as to Hester, where it was affirmed. Costs were

awarded and the crossbills of petitioners finally dismissed. Such a judgment as to that thus done is unquestionably final. Compare *Fitzpatrick* v. *Flannagan*, (Miss.), 106 U.S. 648, 27 L.ed. 211; *Illinois Central Railroad* v. *Miller*, 141 Miss. 213, 106 So. 635.

(b) Knox of Mississippi, with deference, is in error in contending that the judgment as to the original bill herein was not final and reference thereto herefor is made. The assumed limited remand in no wise took away the final character of that assumed to be adjudged by the six members of the Court contra. Compare 6 *Moore's Federal Practice*, 2nd Ed., Sec. 54.13; *Forgay* v. *Conrad*, 6 How. 201, 12 L.ed. 404; Annotation, 97 L.ed. 208; and especially the dissenting opinion of Justices Black and Douglas in *Montgomery Trades Council* v. *Ledbetter Erection Co.*, 344 U.S. 178, 97 L.ed. 204, 207.

Compare, especially, in the *Republic Natural Gas Co. Case*, supra, the dissenting opinion by Mr. Justice Rutledge wherein Justices Black, Burton and Murphy joined. See, also, *Radio Station WOW* v. *Johnson*, 326 U.S. 120, 89 L.ed. 2092.

Petitioners will be wrecked as to their fame and finances if this judgment is not made subject to this writ. The seriousness is stressed in the original suggestions of error and, with deference, cannot be successfully disputed.

It is, therefore, respectfully submitted that this decree is final and the Supreme Court of Mississippi could not have overruled the motion for transmission and stay on the ground that the judgment was interlocutory.

ARGUMENT

Herein there are special and important reasons affecting not only petitioners but the public why the writ should be

granted. There is a primary constitutional question of an exceedingly complicated character as to how far the judicial action constitutes "state action" so as to violate the Fourteenth Amendment. "* * * This is a complicated problem which for long has divided opinion in this Court. * * *." *Rice* v. *Sioux City Memorial Park Cemetery*, 349 U.S. 70, 72, 99 L.ed. 897, 900. Herein, Mississippi's Court, contrary to the decisions of this Court, undertook to integrate Mississippi's law, displacing the sovereignty of Pennsylvania, and in addition, unconstitutionally assumed to destroy the right to contract and to substitute therefor tort liability and to admeasure such liability without a constitutional hearing thereasto. In so doing, Mississippi's Court has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision, its action being, with deference, arbitrary and capricious as appears from the record and epitomized in the Constitutional questions propounded hereinabove. Our discussion of the numbered questions is:

I

(a) The Chancellor dismissed Knox of Mississippi's bill and granted full relief (save as to interest) to petitioners. Upon appeal nine Judges divided, expressing five variant views. The original bill averred a fiduciary relationship of certain persons as officers and directors of Knox of Mississippi, and made no averments as to similar fiduciary relations existing upon the part of any of these persons with Knox of Pennsylvania. None of these parties became connected with Knox of Pennsylvania until the death of Roy R. Underwood. This line of demarcation must be kept clearly in mind, for Knox of Mississippi in its original bill —notwithstanding the dominance of Knox of Pennsylvania, and Roy, its President and a holder of slightly less

than one-third of its shares, and the fixation by Knox of Pennsylvania of the uniform policy of over the road leasing—unlawfully sought to have the Chancery Court hold, A.R., 24:

> "2. That the Court declare that all motor vehicles which are the subject of any of the purported leases to complainant in equity should have been purchased for and on behalf of complainant, and that the defendants hold and have held the same as trustees for complainant."

As at the date of the acquisition of fifteen of these trucks, before the death of Roy R. Underwood, that each lessor be declared a trustee for Knox of Mississippi, notwithstanding the policy thereasagainst fixed by Knox of Pennsylvania admitted even by the majority opinion in the Supreme Court, 89 So. 2nd 817, A.R., 109:

> "* * * the Court * * * holds that there was a full disclosure to the stockholders and directors of Knox of Pennsylvania through the man to whom they had delegated the executive powers, Roy R. Underwood. The board of directors gave him authority to determine the business policies of the holding company and its subsidiary. This authority was knowingly vested solely in him. It would be highly inequitable at this late date to permit complainant corporation to recover rentals paid on the truck leases during the period when Roy was the executive head of the Knox companies, when he had full knowledge of the leases and the revenues derived from them and when the leases were kept in force and effect by complainant under his express instructions, which were based upon a good faith business-judgment decision by him as the president of both Knox of Pennsylvania and Knox of Mississippi. * * * Complainant is

estopped from asserting a claim to truck rentals while Roy was the executive and dominating head of the Pennsylvania corporation."

Compare, also, corporate ratification, A.R., 151.

We assume, therefore, that these leases during his lifetime were valid per se, but if not, being continued in force under specific direction when he was totally disinterested, and the rent collected, the leases were ratified. Compare 19 *C.J.S.*, "Corporations", Sec. 763, p. 111; Sect. 778, p. 147; Sec. 783, p. 157; *Hines* v. *Hambrick*, 210 Miss. 358, 49 So. 2nd 690; *Crabb* v. *Wilkinson*, 202 Miss. 274, 32 So. 2nd 356; Vol. 3, *Pomeroy's Equity Jurisprudence* (5th Ed.), Sec. 820, p. 257; *Manufacturers' Trust Co.* v. *Becker*, 338 U.S. 304, 94 L.ed. 107. This failure thus to recognize corporate ratification as effectual would unsettle all corporate business.

The utmost that could be claimed was not that the leases were void ab initio, but only voidable. *Twin-Lick Oil Co.* v. *Marbury*, 91 U.S. 587, 590, 23 L.ed. 328, 330:

> "* * * If he should be a sole director, or one of a smaller number vested with certain powers, this obligation would be still stronger, and his acts subject to more severe scrutiny, and their validity determined by more rigid principles of morality, and freedom from motives of selfishness. All this falls far short, however, of holding that no such contract can be made which will be valid; and we entertain no doubt that the defendant in this case could make a loan of money to the Company; * * *."

This doctrine is so deeply ingrained as that its subversion would be capricious and arbitrary. The law has never allowed a pro tanto ratification. The lease was a unit. It had to be accepted as a unit precisely as it was formulated

by Knox of Pennsylvania. Seven years' performance, with millions paid, has always been, under universal law, adequate to establish an implied contract even if one had not been expressly written.

In the brief of opposite counsel the ownership and control of Knox of Pennsylvania was referred to as a "myth". With deference, the ownership of one-third of the shares of any corporation, circumstanced as was Knox of Pennsylvania, did constitute control and all of the shareholders were happy with Roy as the dominant genius, renewing a plenary proxy of 1934, in 1942 and 1947, and at his passing, devoted $100,000 to a suitable memorial as that due him for what he had done for the Company. A gift of such an amount by those thus circumstanced cannot be considered as a dissipation of corporate assets to corporate hurt, unless this Court be willing to follow the majority of Mississippi's Court in criticizing this policy, which had thus fructified, as "manifestly erroneous"—"improper". After his death, with a full review of that by him accomplished, those competent to speak for the corporate management said as to these leases that it was well done; and that here attempted by the Mississippi Court is to usurp, after the manner of a police state, authority corporately possessed *Missouri ex rel. Southwestern Telph. Co.* v. *Missouri Public Service Com.*, 262 U.S. 276, 67 L.ed. 981. More remarkable still, the sole predicates therefor are (a) alleged delinquencies, fully investigated by Roy and rectified, as he had a right to do under corporate authority; and (b) an opinion as to the corporate policy based exclusively upon the earnings of the isolated Knox of Mississippi without integrating it as a component part of the Knox empire, and expressed on the assumption that the precise amount of profit would have been earned had Roy's formula as to over-the-road leasing not been followed; but more especially the con-

fident expression after the acts had become history and the effect unchangeable, that the Underwoods should have purchased and not leased. We commend Judge Roberd's declaration hereasto as absolutely apposite, 89 So. 2nd 836, A.R. p. 141:

> "The fairness of the transaction must be measured not by hindsight but in the light of the circumstances which presented themselves at the time of the transaction. 'A wisdom developed after an event, and having it and its consequences as a source, is a standard no man should be judged by. * * *.' Costello v. Costello, 209 N.Y. 252, 103 N.E. 148, 152."

On the evidence constitutionally admissible, there was not a scintilla that would support the business policy of Mississippi's majority which, had it been adopted, would have not only taken away substantial profits (as we submit, properly found by the Chancellor) but would have disrupted the personnel of the organization to such an extent as that an entirely new executive staff would have to have been installed. Under Mississippi's majority finding, all of them would have been unfaithful employees, but, thanks be, Mississippi's Court was without judicial power to integrate that devastating theory into this particular corporate setup.

(b) The highest echelon was centered in Knox of Pennsylvania, and any policy thereof personally affected Roy R. Underwood to a far greater extent than any one else. His characteristics were appreciated by all parties and expressly integrated into the Majority Opinion thus, p. 807, A.R. p. 91:

> "* * * Roy R. Underwood made all major decisions concerning the operations of the Knox plants. The evidence amply supports the Chancellor's finding that the board of directors of Knox of Pennsylvania, which

> owned all of the stock in Knox of Mississippi, did not question Roy R. Underwood's judgment in the operation of the Knox businesses. * * *."

C. R. Underwood did not become a director of Knox of Pennsylvania until after his brother's death in 1951, and, insofar as the record shows, neither he nor his family had any direction or control in Knox of Pennsylvania until this time. So that as to everything that predated—inclusive of 15 leases of trucks to petitioners—there were no disqualifying circumstances, but complete domination by Knox of Pennsylvania. Compare *Chicago, Milwaukee & St. Paul R. Co.* v. *Minneapolis Civic & Commerce Association,* 247 U.S. 490, 62 L.ed. 1229, where this Court declared such a subsidiary was not "free to impose separate carrying charges upon the public". See, also, *Latty,* "Subsidiaries and Affiliated Corporations", wherein he said, p. 166:

> "Or, again, if the officers in charge of the subsidiary's business are not the superiors within the organization, any realist must admit that the 'requests' of the parent with respect to the subsidiary's business have the effect of commands. Such officers or employees of the subsidiary has no more 'freedom' than did the directors of the subsidiary in the Chicago, M. & St. P. case. In fact, the directors of the latter subsidiary had the power to disregard the agreement, pick their own superintendent and interchange business with whomsoever they pleased; of course, if they did they would be put out of the organization, which is exactly what would happen to the subordinates who staff the subsidiary in the set-up above mentioned."

Approved in *Certain-Teed Products Corporation* v. *Wallinger,* CA 4, 89 Fed. 2nd 427 (certiorari denied, 302 U.S. 707, 82 L.ed. 546), 436, thus:

"* * * The argument is well put in Latty on Subsidiaries and Affiliated Corporations, p. 85, as follows: '* * * In other words, * * * where the directors and officers of the subsidiary are subordinate employees, the parent corporation is at once the de facto board of directors and the managing officer of the subsidiary. * * *.'"

As to how this Court regarded subsidiaries under somewhat similar circumstances, compare *United States* v. *Reading Co.*, 253 U.S. 26, 64 L.ed. 760; *United States* v. *Lehigh Valley R. Co.*, 220 U.S. 257, 55 L.ed. 458; *United States* v. *Delaware & Hudson Co.*, 213 U.S. 366, 53 L.ed. 836; *Pullman's Palace Car Co.* v. *Missouri Pacific R. Co.*, 115 U.S. 587, 29 L. ed. 499; and, see *Centmont Corp.* v. *Marsch*, CA 1, 68 Fed. 2nd 460, Syl. 7; and *Powell on Parent and Subsidiary Corporations*, Ch. VI. As to the power of Knox of Pennsylvania over Knox of Mississippi where supervision was contracted for and obtained, compare *Urschel* v. *Stone*, 198 Miss. 105, 21 So. 2nd 466, wherein corporate identity was disregarded, vouchsafing Knox of Pennsylvania dominance so as that herein Knox of Mississippi may not, with deference, complain. Compare *Cannon Manufacturing Co.* v. *Cudahy Packing Co.*, 267 U.S. 333, 69 L.ed. 634. Note the finding of the Chancellor as to the perfunctory manner in which the Boards functioned under Roy, A.R., 64.

Compare the characterization of the Mississippi Directors by Judge Lee, 89 So. 2nd 831, A.R. 145:

"* * * They were in fact servile followers and lackeys, without any actual authority whatever. * * *."

We quote this statement only as far as it is essential, namely: the policy of truck leasing and truck acquisition.

The obligations of the directors of Knox of Pennsylvania are controlled by Article 2852-408, Purdon's Pennsylvania

Statutes, Annotated, Title 15, wherewith presumptively full compliance has been, quoad that done by Roy, who had 100% power of attorney. As said in 3 *Fletcher on Corporations*, Sec. 940:

> "An agent may 'represent the corporation in executing a contract with himself personally,' says Mr. Morawetz, 'provided he acts under immediate instructions from some other superior agent or from the board of directors.' This rule was applied in a case where it appeared that the manager, 'in making the lease, was acting under the instructions of the president and directors of the railway company. The lease was not his act as agent of the railway company, but it was the act of his superior, the president of the corporation, and hence he cannot be regarded as dealing with himself.'"

Compare 1 *Morawetz*, Sec. 527, p. 473 (2nd ed.); *Louisville, N.A. & C. Ry. Co.* v. *Carson*, 151 Ill. 444, 38 N.E. 140; *Blish* v. *Thompson Automatic Arms Corp.*, 30 Del. Ch. 538, 64 A. 2nd 581; Sp. *North American Co.* v. *S. E. C.*, 327 U.S. 686, 90 L. ed. 945; 1 *Fletcher on Corporations*, Sec. 46, p. 175. So, with this execution of these leases thus administratively done by the minor executive officers, including a mere auditor, pursuant to the direction of the corporation functioning through Roy, the parties so signing were not regarded as other than the pen wherewith the signature was, and not as individuals negotiating with themselves as adversely interested. Insofar as adverse personal interest was concerned, there was a standard form in accordance with substantially a "published rate" in consonance with the Transportation Act, the Robinson-Patman Act, the Motor Carriers Act, and similar State acts. The complaint was not that the cost of carriage was excessive, for it was

uniform as to Smith, DeViney and Patten, and renewed in December, 1953, until February 1954, upon this precise basis. A majority of Mississippi's Court should have known that when precisely the same work is performed by an employee under incentive compensation as that done by another, the master may not pay one price to one and another price to the other and have harmonious functioning personnel. The form of the contract came down from above and the parent corporation had accurately appraised the cost of thus doing business, beginning with May 25, 1946, with J. G. and C. H. Smith, sales agents. The lease provisions have not from that time until now in any way as to the rental varied. It cost Knox of Pennsylvania through its subsidiary, Knox of Mississippi, precisely the same to deliver its glass through Smith, sales representative, as it did through C. R. Underwood, vice-president. There was no difference. Nor did the pick-up customers receive a different allowance. In short, Knox of Pennsylvania as to these leases was pursuing precisely the same policy as was pursued by United Shoe Machinery Corporation in its business attacked before this Court in *United Shoe Machinery Corp.* v. *United States,* 258 U.S. 451, 66 L. ed. 708. The policy given by Knox of Pennsylvania to Knox of Mississippi was specific and the power in the parent to determine that there should be over-the-road leases gave to the parent the power to determine the amount of rent that should be therefor paid. Here, Knox of Pennsylvania spoke with authority as the owner of the property, and the subordinate officers of Knox of Mississippi could not abrogate that which they were commanded to do, and, having thus done, were not tort feasors because they had followed the directions of the owner.

In *Spangler Brewing Co.* v. *McHenry,* 242 Pa. 522, 89 Atl. 665, one of the organizers of the corporation, who later was elected treasurer, had obtained title to certain real

estate for $850.00. At the first meeting of the corporation, the stockholders recommended that the directors purchase this real estate from their treasurer for the price of $57,900. The purchase was consummated. The company subsequently filed a bill in equity for an accounting, seeking to recover for the large profit made by the treasurer on the grounds that he had breached his fiduciary duty to the company. The court ruled that the company could not recover on the grounds, inter alia, that the purchase had been made "in pursuance of authority to do so given to the directors by all of the original stockholders * * * ". 242 Pa. 522, at p. 529. See, also, *Hook* v. *Hook and Ackerman*, 375 Pa. 278, 100 A. 2nd 374.

On each of these lease contracts, in law, would appear "Countersigned: Knox of Pennsylvania, by Roy R. Underwood, President and Sole Stockholder under Proxy". Meetings of Knox of Mississippi were not regularly held and not infrequently minutes were transmitted for adoption from Pennsylvania as testified by Miss Luter.

(c) The outstanding averments of the original bill seeking liability imposition are as to Knox of Mississippi, not Knox of Pennsylvania, A.R. pp. 6, 19:

> " * * * The said Roy R. Underwood, however, resided in the State of Pennsylvania and made only infrequent trips to the State of Mississippi mainly in connection with the annual stockholders' meeting of the complainant corporation. Although the said R. R. Underwood was the nominal president of the complainant corporation during the period aforesaid, in truth and in fact, the active executive and managing officer who was in active control and charge of the operations of the complainant corporation was the defendant C. R. Underwood. During the periods of time complained of in this bill of complaint and until

November 26, 1953, the *defendant C. R. Underwood was at all times an officer and a director of the complainant corporation and assumed and exercised complete and absolute domination, influence and control over the Board of Directors and officers of the complainant corporation.*"

and

"Complainant avers, upon information and belief, that the defendant C. R. Underwood claims that he reported the facts in connection with the aforesaid truck leases to his brother, R. R. Underwood in Knox, Pennsylvania, during the lifetime of said R. R. Underwood, but complainant avers that such reports were only pretended reports, and the defendant C. R. Underwood did not report the facts fully, fairly and accurately, *and complainant avers that in no event did the stockholders of Knox of Pennsylvania, who are the beneficial owners of all the assets of complainant corporation, have any knowledge of or consent to or approve of the activities of the defendants as aforesaid.*"

Thus, complainant's sworn bill assumed to recognize as valid—and it so was—all done by Roy as to Knox of Pennsylvania and Mississippi which embraced the manner wherein it was done. The most remarkable thing is that Mississippi's majority assumed, notwithstanding these allegations as to the rightfulness of that done by Roy, to hold invalid all of that done in virtue of 100% stock ownership and to integrate assumed tortious liability. A fundamental violation of the Constitution, Fourteenth Amendment, occurred when Mississippi's Court assumed to displace that validly done within Knox of Pennsylvania—the owner—conferring authority for over-the-road lease and to render

tortious a failure to purchase trucks when Knox of Pennsylvania had unanimously determined contra.

(d) With this policy validly announced under Pennsylvania law, Mississippi's Court undertook unconstitutionally to vacate that and to impose tort liability in virtue of first isolating Knox of Mississippi, but thereasto the Mississippi Court was without power, because (1) the pleadings upon which the decree is rendered specifically recognized Roy's authority to do that done; and (2) this was not a mere misinterpretation of the law, but the integration of inapposite Mississippi law to supersede that law appropriately applicable under Pennsylvania's sovereignty, within the rule of *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co.*, 292 U.S. 143, 78 L. ed. 1178, 1181:

> "The Mississippi statutes, so construed, deprive the appellant of due process of law. A state may limit or prohibit the making of certain contracts within its own territory (Hooper v. California, 166 U.S. 648, 39 L. ed. 297, 15 S. Ct. 207, 5 Inters. Com. Rep. 610; Orient Ins. Co. v. Daggs, 172 U.S. 557, 565, 566, 43 L. ed. 552, 555, 556, 19 S. Ct. 281; New York L. Ins. Co. v. Cravens, 178 U.S. 389, 398, 399, 44 L. ed. 1116, 1123, 1124, 20 S. Ct. 962); but it cannot extend the effect of its laws beyond its borders so as to destroy or impair the right of citizens of other states to make a contract not operative within its jurisdiction, and lawful where made. New York L. Ins. Co. v. Head, 234 U.S. 149, 58 L. ed. 1259, 34 S. Ct. 879; Aetna L. Ins. Co. v. Dunken, 266 U.S. 389, 399, 69 L. ed. 342, 349, 45 S. Ct. 129. * * *."

See, also, *Watson* v. *Employers Liability Assurance Corp.*, 348 U.S. 66, 99 L. ed. 74, 81.

Here, prior to Roy's death leases were executed whereunder Knox of Pennsylvania effectuated its purposes

through its subsidiary, Knox of Mississippi, whose property it fundamentally controlled, *Millsaps* v. *Bank*, 71 Miss. 361, 13 So. 903; and to allow Mississippi's Court to subvert that determined by Knox of Pennsylvania by making an alleged fiduciary contravene the paramount obligation imposed by the parent, would be to allow the subsidiary to recover damages from its directors for not obstructing the leasing policy imposed by the parent. Under such circumstances, with Knox of Pennsylvania as the owner, this Majority might not take away the right of ownership and of management. *Missouri ex rel Southwestern Bell Telph. Co.* v. *Missouri Public Service Comm.*, 262 U.S. 276, L. ed. 981. Mississippi's Court, with deference, is repeating its performance in the *Hartford Case*, supra, and also in *Brown* v. *Ohman*, —— Miss. ——, 43 So. 2nd 727, as set forth in the dissenting opinion of Judge Montgomery.

Note that this Majority assumed to completely deny to Knox of Pennsylvania and petitioners the right to "contract". In overruling the Suggestions of Error, the six Judges declared, 91 So. 2nd 843 A.R., p. 155:

> "Of the numerous questions argued in the several suggestions of error the most forceful one is based on the premise that the Court held in its original decision that the lease *contracts* were valid until Roy Underwood died. This premise is not correctly assumed. The majority of the Court did not consider, and did not hold, the leases valid prior to the death of Roy Underwood. It was held that under the peculiar circumstances of the case the appellant was estopped to assert their invalidity.
>
> "In our opinion none of the question presented justify *any change in our decision.*"

This is accentuated most positively by the fact that the present control of Knox rests with those who displaced the

Underwoods as at say, December 1, 1953, but, assuming these contracts to be valid, notice was given of cancellation as at January 6, 1954, pursuant to the thirty day clause and cancellation actually wrought thereby. This effectuation by contract of Knox of Pennsylvania's policy has been completely extirpated by this most remarkable opinion wherefor, with deference, there is no constitutional basis.

As was done in the *Hartford Case,* supra there was raised the question similarly of the Equal Protection of the law and therein having held the Due Process Clause violated, no decision was, but herein we claim the Equal Protection Clause was likewise violated. There can be no question but that there is a right to contract fundamentally granted under the Constitution, *New State Ice Co.* v. *Liebmann,* 285 U.S. 262, 76 L. ed. 747, and further that when it comes to classification, there must be an adequate basis therefor. Herein consider the case of *Ballard* v. *Mississippi Cotton Oil Co.,* 81 Miss. 507, 34 So. 533, following *Gulf, Colorado & Santa Fe Ry. Co.* v. *Ellis,* 165 U.S. 150, 41 L. ed. 666, which expresses the fundamental law presently applicable.

Herein, there was a co-partnership between W. E. Hester, Jr., and E. F. Underwood. Mississippi's Court had before it a lease made by the copartnership to Knox of Mississippi, it being said that Hester was under no disqualification but that E. F. Underwood was. Mississippi's Majority assumed as to this unit contract, covering a single truck, to sever and divide the rent arising therefrom so as to give to Hester all rent and allow him to retain all rentals precedently received, yet to deny to Underwood all rent unpaid and compel a refund of all rentals precedently received since January 1, 1952. There was no dissolution of the copartnership which was engaged in leasing trucks. There was no partnership accounting, and the lease was precisely the same as had precedently been made to Smith, DeViney and Smith. Mississippi's Majority sustained the contract

as a predicate for recovery. We respectfully submit that it was beyond judicial power to thus sever and divide. The lease was a unit and so being, judicially is what precedently the atom was assumed to have been. Mississippi's Majority now goes back and severs each payment made for rental into two parts, one part allocated to Hester as lawfully received; one part, equally paid under the same check, to Underwood, and that was adjudged illegally received with a refund made requisite. It is respectfully submitted that Mississippi's Court cannot thus sever and divide a hair between the south and the southwest side.

As to the leases after the death of Roy R. Underwood, it is respectfully submitted that his death, not having been therein mentioned, could have no effect whatever. Individually he was not a party thereto nor could he sue thereon directly and when he was accidentally killed, there were in existence these legal relations precedently validly fixed initially, or else validly ratified, and so being the lessors were entitled to continue to hold that specifically given them under these lease contracts when the lessee persisted in retaining the trucks and in operating them in accordance therewith.

II

Six Judges denied that the standard lease was a valid contract, notwithstanding the method wherein it was made and the performance thereunder had for more than a five year period during which time Roy still lived. The Mississippi directors never dared once to have their minutes show any assumed authority over the leases or to interfere in any way directly or indirectly therewith.

Mississippi's Majority could not metamorphose these lease contracts of Knox of Pennsylvania, administratively executed through Knox of Mississippi, so as to extirpate their terms and in lieu thereof set up a variant tort liability.

Knox of Pennsylvania had closed the door upon the doctrine of "corporate opportunity." Knox of Pennsylvania determined that irrespective of the amount of the apparent profits arising from truck ownership they would not sanction it. Knox of Pennsylvania was conversant with the fact that it was paying to Smith, Patten, DeViney and the widow precisely the same amount as it had agreed to pay to petitioners, and having agreed to pay a specific sum for a specific service under a written contract there was no room for implication of a reasonable consideration. Compare *Timberlake* v. *Thayer*, 71 Miss. 279, 14 So. 446; and *National Burial Association* v. *Wright*, —— Miss. ——, 21 So. (2d) 589.

(a) Upon May 25, 1946, Truck No. 5 was leased by J. G. and C. H. Smith, employees, and continued in effect in accordance with the terms of the lease until December 1, 1953. Smith was a sales executive, but not technically either a director or an officer until the reorganization.

(b) Upon December 6, 1947, a precisely similar lease was made by sales executive Patten as to Truck No. 6, which lease was substantially transferred to C. R. Underwood upon April 24, 1950, and later in the same form transferred to F. C. Hicks and was operated until February 23, 1954.

(c) Truck No. 10 was leased by J. H. Underwood on September 3, 1948, and surrendered to Knox on February 23, 1954.

Each of these leases, (a), (b) and (c), were in terms identical, with meticulous performance, both by lessor and lessee, until termination. Yet Mississippi's Majority held lease (a) to Sales Manager Smith valid, lease (b) to Sales Manager Patten valid, until transferred to C. R. Underwood, thereafter contaminated by an alleged obligation to surrender a perfectly proper contract, and lease (c) contaminated ab initio and contract void.

Mississippi's Majority specifically states that quoad these

leases the "doctrine of corporate opportunity does not apply to this case", 89 So. 2nd 814, because of Roy, obviously, and the 100% stock proxy held by him in Knox of Mississippi. Also Knox of Pennsylvania did not desire to engage in the trucking business through Knox of Mississippi, and by reason thereof, the handling of the glass was to be by rail, trucks or common carriers. After making this most remarkable concession the Majority then assumes to cancel the legal effect thereof by declaring, 89 So. 2nd 814:

> "We are here concerned with whether another and much broader rule is applicable to the facts. It is undisputed that the defendant fiduciaries and their personal friends and business associates have made large personal profits at the expense of the corporation. • • •"

but so did Smith, et al, employees, under the uniform contract superimposed from above, as well as all who accepted delivery at the point of manufacture. The corporation elected voluntarily not to do this business. It went one step further, it used this leasing as incentive compensation among the coterie who made its phenomenal success possible. That thus assumed to be held is that when Knox of Pennsylvania through Knox of Mississippi elected not to truck, but to have these petitioners to truck and there through petitioners, acting under Knox of Pennsylvania did so truck and profits therefrom arose, those profits belonged not to petitioners who did the trucking, but to Knox of Pennsylvania who not only would not do the trucking, because it was deemed improper but expressly had petitioners do that which it declined to do. This is a most far-reaching doctrine, for if it be possible for a corporation to elect not to do, and then to have its officers, though in a fiduciary capacity, do that which it declined to do, and perchance large

profits arose therefrom, then the corporation could sue and recover these profits. Not only so, but in this case Knox of Pennsylvania knew after 1948 that there were such profits in the trucking business; and with knowledge that these profits, or potential profits, were there, Roy determined that the condition of Knox of Pennsylvania demanded that its capital be confined to manufacture. This case goes further than any case, with deference, in the books in invading, unconscionably and unconstitutionally, the right of private contract. Compare *Missouri ex rel Southwestern Bell Teleph. Co.* v. *Missouri Public Service Commission,* 262 U.S. 276, 288, 289, 67 L. ed. 981, 985:

> "There is nothing to indicate bad faith. So far as appears, plaintiff in error's board of directors has exercised a proper discretion about this matter requiring business judgment. It must never be forgotten that while the state may regulate, with a view to enforcing reasonable rates and charges, it is not the owner of the property of public utility companies, and is not clothed with the general power of management *incident to ownership.* The applicable general rule is well expressed in State Public Utilities Commission ex rel. Springfield v. Springfield Gas & E. Co., 291 Ill. 209, 234, P.U.R. 1920 C, 640, 125 N. E. 891:
>
> " 'The commission is not the *financial manager* of the corporation, *and it is not empowered to substitute its judgment for that of the directors of the corporation;* nor can it ignore items charged by the utility as operating expenses unless there is an abuse of discretion in that regard by the corporate officers.' "

We would never have believed it possible that there should be a wilful tort liability imposed upon a faithful officer who trucked where his corporation would not truck (the cor-

poration knowing the profits were there), and then when the trucking had been had and the profits accrued, as it was known they would accrue, to say that such profits were "at the expense of the corporation." Herein, this Majority has gone to the extent of declaring that where there are these potential profits and they were known to exist (but accompanied by business risks), a corporate officer may not with 100% approval of the corporation take the risk to get the profits, without assuming a potential liability for damages as an unjust steward. The Court completely overlooks the principle thoroughly settled, as explained in *Spangler Brewing Co.* v. *McHenry,* 242 Pa. 522, 89 Atl. 665. Consent once given by stockholders precludes such recovery. Compare *Crabb et al* v. *Wilkinson, et al,* 202 Miss. 274, 32 So. 2nd 356. In this Court in *Twin-Lick Oil Co.* v. *Marbury,* 91 U.S. 587, 590, 23 L.ed. 328, 330, we find a flat denial of this declaration, for therein Mr. Justice Miller said as above quoted and, further:

> "• • • and as we have already said that the evidence shows it to have been an honest transaction for the benefit of the Corporation and its shareholders, both in the rate of interest and in the security taken, we think it was valid originally, whether liable to be avoided afterwards by the Company or not.
>
> • • •
>
> "The doctrine is well settled, that the option to avoid such a sale must be exercised within a reasonable time. • • •."

So, when Knox of Pennsylvania, sole stockholder, determined to obtain more efficient operation of its business under uniform cost of delivery contracts, these became binding obligations. Knox of Pennsylvania possessed plenary power over the property of Knox of Mississippi. Compare

Millsaps v. *Bank*, 71 Miss. 361, 13 So. 903. The corporation, especially the Pennsylvania corporation, was constricted in its capital and though there were funds wherewith trucks might be purchased, and in fact were purchased by the corporation, this did not constitute a basis upon which Mississippi's Majority could compel that to be done which the owner of the property elected not to do, and, more especially, could not hereasto create an "estoppel", for therein there was no representation upon which reliance was. *Turnipseed* v. *Hudson*, 50 Miss. 429; "Surely in vain the net is spread in the sight of any bird," Proverbs 1:17.

In 1946, Knox of Pennsylvania, functioning through Knox of Mississippi under the genius of Roy Underwood, had for solution the question of most effective and economical distribution, nationwide, of its bottles. As managing head, Underwood considered the overall financial set-up of the empire and he knew its strengths and weaknesses. He exercised his foresight as to the exactions by the federal and state government for taxes. He weighed in the balance the possible competition of paper and plastics with glass and most especially the relationship between his minor executives and an incentive to them to continue the upbuilding of the business. As attorneys, we say he considered these, but obviously there were many other factors which he well knew and had to integrate into his business forecast. When he had weighed all of these possibilities his pronouncement was: no purchases but leases upon the basic rate of published carload freight rates. That policy thus conceived was executed by the personnel of his organization with most outstanding success and with large profits. That thus foreseen by his genius bore fruit. Now, having thus secured these profits through this foresight and this cooperation of his minor executives, we have this decision of the Court that this policy was "manifestly erroneous"—"improper"; and

in virtue of it, there is a vacation of all of the contracts wherethrough these profits were created, with personal decrees spelling financial ruin for those who thus produced. With the utmost deference, the sole factors which Mississippi's majority has invoked thus to wreck those who thus constructed are (1) alleged personal delinquencies, bearing no relationship whatsoever to the conduct of the business; and (2) the delineation by the Court at length of the amount of the profits made pursuant to this decision of Roy thus to lease. With a display of these results thus created by his genius, we have an alleged opinion of one who never, so far as the record discloses, blew a bottle or coordinated the personnel of a widespread empire. That by this accountant done was after the earnings had been made to compile the same so that their magnitude would appear and then ex post facto to declare that if leases had not been made but purchases had been made *and* business had been precisely the same, then that the amount of profits would have been that much greater had the purchases been consummated. Any third grade school boy could make those figures. But that which this accountant could not have foreseen was the effect upon this business after the date of the change. Naught in this record warrants the adoption of that which, with deference, was not an opinion, because every unknown factor existing had become a constant when his alleged judgment of what should have been was expressed. That which had become history could not be rewritten. That which Morgan omitted, with deference, was Hamlet with the Prince of Denmark left out.

Suppose as at January 1, 1952, the Majority of Mississippi's Court had judicially cancelled every lease and judicially compelled a purchase. Visualize, please, the effect upon the organization when such a decree was rendered. From one aspect alone every employee, inclusive of those

whose kindred were benefited through accumulations without death duties and crushing income tax payment, would have forthwith been compelled to refund to the corporation the amount of such rental payments, notwithstanding an inability on their part to recoup. Just think of it: After full performance for more than seven years, these lease contracts, meticulously adhered to, were cast overboard judicially and petitioners allowed only the cost of their purchase —depreciation. With deference, the decisions of this Court never sanctioned confiscation of profit and property through an alleged fiduciary relationship whereasto there had been full knowledge, full approval and full acquiescence.

Even where there may be by reason of public service a regulation of profits, the Constitution guarantees the owner of the property a reasonable return thereon and denies the government the right to permit the user without such return. Compare *Bluefield Water Works and Improvement Co.* v. *Public Service Commission*, 262 U. S. 679, 67 L. ed. 1176 (1923); *Smyth* v. *Ames*, 169 U. S. 466, 42 L. ed. 819; *West* v. *Chesapeake & Potomac Telephone Co. of Baltimore City*, 295 U. S. 662, 79 L. ed. 1640 (1935).

We are conscious that the Majority opinion states, 89 So. (2d) 811:

> "* * * On the other hand, it does not appear that the other directors of Knox of Pennsylvania, which owned all of the stock in complainant, or its stockholders had full or any substantial knowledge of the details of the trucking operations by complainant or the extent of profits being realized by the defendants."

This is a clear misconception—first, of the law, for when once a corporation receives notice of the right to avoid, it cannot after rectifying, unratify; it cannot after receiving valid notice pretend that that which was validly given has

been effectually effaced by loss of memory. Secondly, it is a misconception of fact, in that the record discloses that there were present at the hearing substantially all of the directors and the general counsel, and at that time the pilot of Roy Underwood directly testified that from plant level up those factors were known. Audits were had, photographs taken and a fund of $100,000 donated to express appreciation for that done by Roy in his lifetime and to assume that corporate directors would devote $100,000 to a memorial when they did not know that which they were assuming to memorialize is to assume the unassumable. We cannot stress too strongly that Knox of Pennsylvania exacted from its subsidiary $2,000 a month for supervision and if Knox of Pennsylvania did not supervise adequately when paid therefor by its subsidiary, Knox of Pennsylvania may not use the default alleged quoad Knox of Mississippi for unjustly enriching itself when it left undone that wherefor it was paid.

The majority of the Court assumed to refund to petitioners the actual cost of the trucks substantially without more and thereby obtaining such title ex post facto as to give respondent all profits from the date of purchase and to account as Knox of Mississippi property each and every truck. Such was the invasion by respondent of the right to liberty and property.

Thus, when the Majority assumed to declare that this policy was "manifestly erroneous", when validly established by the Pennsylvania corporation, the Court could not in virtue of its differences with the owners of the property as to that which was proper or improper give to the owners that which the owners had voluntarily contracted to pay to petitioners for the use of their property. This is a clear violation of *Thompson* v. *Consolidated Gas Utilities Corp.*, 300 U.S. 55, 81 Led. 510.

The vital question is, has Mississippi's Court judicial power as to that done to declare petitioners to be without contracts and to have become wilful wrongdoers? At least three Judges of that Court answered this question in the negative. The other six Judges therewith disagreed and assumed to hold that no contract was: (1) Judges Ethridge, Holmes, and Gillespie holding this condition persisted from 1946 until February 23, 1954; but (2) Chief Justice McGehee, Judges Hall and Kyle holding that though there was no contract, yet under "peculiar circumstances" an estoppel existed until January 1, 1952, against Knox of Mississippi whereafter recovery for the tort might be; and that during that entire period, 1946 to February 23, 1954, petitioners were malefactors without right to protection of contract law although each party had meticulously done *performam doni*. Millions of dollars were paid upon this assumption. These six judges, though disagreeing, put petitioners out from under the protection of contract responsibility and denied to them that which the Constitution has so carefully vouchsafed. These Judges, with deference, thus consciously disregarded prior decisions of this Court and of their own Court. Compare *Wilby* v. *State*, 93 Miss. 767, 47 So. 465; *Moore* v. *Grillis*, 205 Miss. 865, 39 So. 2nd 505; *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 278, 76 L.ed. 747, 754:

> "Plainly, a regulation which has the effect of denying or unreasonably curtailing the common right to engage in a lawful private business, such as that under review, cannot be upheld consistent with the Fourteenth Amendment. Under that amendment, nothing is more clearly settled than that it is beyond the power of a state, 'under the guise of protecting the public, arbitrarily (to) interfere with private business or prohibit lawful occupations or impose unreasonable and

unnecessary restrictions upon them.' Burns Baking Co. v. Bryan, 264 U.S. 504, 513, 44 S.Ct. 412, 413, 68 L.ed. 813, 32 A.L.R. 661, and authorities cited; * * *."

See, also, *Liggett Co.* v. *Baldridge,* 278 U.S. 101, 73 L.ed. 204.

In the instant case, the petitioners (who were in the employ of Knox of Mississippi and being compensated in part through these leases therefor) felt that they were being remunerated for their services and these payments were gladly made for value received and still, with deference, so think. But the majority of Mississippi's Court have made of these leases and the amounts received thereunder a gift, having the same effect as the bridal robe from Medea to Creoso. The effect upon them, both in character and financially, has been quite as disastrous. But we have the fact that petitioners were in court and this decision was of a court. Compare *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill,* 281 U.S. 673, 74 L.ed. 1107. That the action was judicial, if contrary to the Constitution, leaves it remediable here. *Hovey* v. *Elliott,* 167 U.S. 409, 42 L.ed. 215; *National Union of Marine Cooks & Stewards* v. *Arnold,* 348 U.S. 37, 99 L.ed. 46. With deference, our viewpoint is that per se this violation is, under the circumstances, so flagrant as to demand rectification. Visualize having relations covering a five year period with possession taken of property under lease, with specific provisions as to termination, the estate created and the rent to be paid, yet this Majority is unwilling to accede to those thus acting the protection of a contract which was solemnly signed and delivered. This opinion says that as at February 23, 1954, there was power in the State of Mississippi to transform a sale of a truck made by General Motors to Underwood, at a fixed price, and rented by Underwood to Knox of Mississippi, for a term and for a fixed consideration, and then after Knox of Mis-

sissippi had purchased this truck from Underwood to compel Underwood to refund to the purchaser of the truck all rentals received from the date of his acquisition until the date of his disposition, less depreciation (inclusive of incidental expenses). This is a denial of the right of individual parties to contract. We are sympathetic to a party's disability when recognized under the law, but when there has been a performance for five years with payment of millions of dollars under the contract, our conscience is shocked, especially if Smith, DeViney and others who served are allowed to retain the full amount of rent, and yet those who are in fiduciary positions without compensation are thus compelled to go bankrupt. That which this Majority has done is substantially to make a rental contract into a sales contract and take from the party who received the rent, the full amount thereof without credit for income taxes paid. This opinion compels the lessor to refund all rentals after the depreciation allowance even though this amount should be five times the purchase price of the truck, thus giving to Knox of Mississippi free distribution of its glass but sacrificing the minor executive who relied upon the policy of Roy as a predicate for his action. Everything that he received in good faith and for value, Knox of Mississippi entered on its books, it is submitted, as an income tax credit of rent paid. It may not after five years reverse that entry and crucify these officers who built up the magnificent business of Knox of Mississippi.

In *American Railway Express Co.* v. *Kentucky*, 273 U.S. 269, 273, 71 L.ed. 639, 641 this Court said:

> "• • • We cannot interfere unless the judgment amounts to mere arbitrary or capricious exercise of power or is in clear conflict with those fundamental 'principles which have been established in our systems

of jurisprudence for the protection and enforcement of private rights.' (Citing cases)."

See, also, *Raymond* v. *Chicago Union Traction Co.*, 207 U.S. 20, 52 L.ed. 78; *Snowden* v. *Hughes*, 321 U.S. 1, 88 L.ed. 497; *Terry* v. *Adams*, 345 U.S. 461, 97 L.ed. 1152; *Barrows* v. *Jackson*, 346 U.S. 249, 97 L.ed. 1586;

In *Roberts* v. *New York*, 295 U.S. 264, 79 L.ed. 1429, 1435, this Court said:

"* * * To bring about a taking without due process of law by force of such a judgment, the error must be gross and obvious, coming close to the boundary of arbitrary action. The test has been differently phrased by different judges and in different contexts. At times we find the statement that the Constitution is not infringed unless there has been 'absolute disregard' of the right of the owner to be paid for what is taken. Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226, 246, 41 L.ed. 979, 988, 17 S. Ct. 581; A. Backus Jr. & Sons v. Fort Street Union Depot Co., 169 U.S. 557, 565, 42 L.ed. 853, 857, 18 S. Ct. 445; Appleby v. Buffalo, 221 U.S. 524, 532, 55 L.ed. 838, 842, 31 S.Ct. 699. At other times we are told that due process is not lacking unless 'plain rights have been ignored, with a reminder that much will be overlooked when there is nothing of unfairness or partiality in the course of the proceedings. McGovern v. New York, supra (229 U.S. 373, 57 L.ed. 1232, 33 S.Ct. 876, 46 L.R.A. (N.S.) 391). From the very nature of the problem these phrases and others like them are approximate suggestions rather than scientific definitions. In last resort the line of division is dependent upon differences of degree too subtle to be catalogued. Hudson County Water Co. v. McCarter, 209 U.S. 349, 355, 52 L.ed. 828, 831, 28 S.Ct. 529, 14 Ann.

Cas. 560; Klein v. Tax Supers., 282 U.S. 19, 23, 75 L.ed. 140, 142, 51 S.Ct. 15, 73 A.L.R. 679. Cf. Davidson v. New Orleans, 96 U.S. 97, 104, 24 L.ed. 616, 619. One cannot hope to make its bearings in a sentence or a paragraph. Enough for present purposes that when the hearing has been full and candid, there must ordinarily be a showing of something more far-reaching than one of dubious mistake in the appraisal of the evidence. Due process is a growth too sturdy to succumb to the infection of the least ingredient of error. 'It takes more than a possible misconstruction by a court to make a case under the Fourteenth Amendment'. Seattle, R. & S. R. Co. v. Washigtan, 231 U.S. 568, 570, 58 L.ed. 372, 374, 34 S.Ct. 185."

Here, no one was ignorant as to the amount of rental being paid under these leases. Under these leases, Knox of Mississippi, under the tutelage of Knox of Pennsylvania, took the trucks of petitioners and thereasto assumed a lessee obligation and expressly promised, for the estate conferred, to make a certain payment. When fifteen of these transactions were had, the Court does not point out a single invalidating circumstance and yet it says that dealing thus with those possessed of property for the possession of that property to effectively distribute that which was distributed, those so intererlated did not, quoad each other, have contract relationship. Mississippi's Court specifically ruled that where, as here, there was an express contract there could be no recovery upon an implied one. *Timberlake* v. *Thayer*, 71 Miss. 279, 14 So. 446; *National Burial Association* v. *Wright*, — Miss. —, 21 So. 2nd 589; and that parol evidence was inadmissible thereasto, *Morrison* v. *Ives*, 4 Sm. & M. 652; *Sims* v. *Boaz*, 11 Sm. & M. 318.

Dealing primarily with the opinion of Judges Ethridge, Holmes and Gillespie that no contract was from 1946 to

February 23, 1954, quoad these trucks, it is respectfully submitted:

(1) Substantially the bill fails to state a cause of action and this majority assumed to decide a question, with deference, that was *coram non judice*, it being impliedly conceded that what Roy did was satisfactory so that an implied contract, at least, would have been. The chancellor so found upon ample evidence, inclusive of testimony of J. A. Huth, Roy Underwood's pilot and confidant. They were so close that he lived with Roy Underwood, night and day, for over six years, during which time he became intimately familiar with the operations of the Knox Empire, including the operation of the clipper trucks under the leasing arrangements. He became a close friend and associate of many of the other directors of the parent Knox and was in frequent contact with them. He testified that the leasing arrangements were discussed from time to time and that "it was common knowledge from plant level up", and that "it was known by everybody." He testified that Roy Underwood was very well satisfied with the arrangements and that the others took the attitude that "if it is all right with Uncle Roy, it is all right with me." (R. 2286). He specifically testified regarding discussions of the leases with four of the directors, in addition to Roy Underwood, these being Harry Zucker, William Garrison, J. T. Helsell and C. O. Alt. (R. 2270-2271).

(2) No audit of Knox of Pennsylvania had been made by Roy Underwood, according to Judge Robert's opinion, 89 So. 2nd 835. C. R. Underwood's audit disclosed that the finances were chaotic and that a $3,000,000 mortgage was requisite. Knox of Pennsylvania then borrowed and in order so to do was required to execute a mortgage whose provisions were prohibitive of truck acquisition as prescribed by Mississippi's Majority Opinion.

(3) When the proxy battle had been won for corporate control, those then in authority, C. Horton Smith, senior vice-president, and Mr. DeViney, junior vice-president, assumed to mail out renewal lease contracts here in controversy as at December 18, 1953 (effective, of course, only on delivery), and assumed on January 6, 1954, to cancel these lease contracts as at February 23, 1954, and assumed to surrender possession as lessee of the trucks as at that date. Claiming the right pursuant to said lease contracts thus to do, they could not repudiate contemporaneously (*Koenig* v. *Calcote*, 199 Miss. 435, 25 So. 2nd 763; *Wood Naval Stores Export Ass'n* v. *Latimer*, 220 Miss. 652, 71 So. 2nd 425; and *Bass* v. *Holland*, Miss. 45 So. 2nd 743), rendering at the same time statements of debits and credits computed strictly in accordance with said contracts.

(4) The attempted isolation and segregation of Knox of Mississippi under the Knox empire set up was a contravention of the Fourteenth Amendment, and not judicial, but, with deference, arbitrary and capricious, disregarding the vested interest of the allied corporations and that requisite for their welfare; and mere non-feasance by the subsidiary officers and directors of Knox of Mississippi could not be tortured into fraudulent wrongdoing when as to the empire they were powerless to compel coordination with that assumed to be prescribed by the Majority Opinion of Mississippi's Court.

(5) Note specifically the approval by the stockholders of the acts of the officers and of the audit wherein these rentals were reflected.

(6) Petitioners, severally, as several lessors executed under their constitutional guaranties valid lease contracts. Pursuant thereto said trucks were severally accepted, utilized and returned as at February 23, 1954. And, now, by the decision of Mississippi's Court, the liberty and property of petitioners as to said leases and said trucks were uncon-

stitutionally assumed to be divested contrary to the provisions of the Fourteenth Amendment. The protection of said Amendment was severally invoked by each petitioner in the several Suggestions of Error. Compare *Wilson* v. *Wood,* 84 Miss. 728, 36 So. 609; and *Usher* v. *Moss,* 50 Miss. 208. And, with this express contractual provision as to termination, the Majority Opinion unconstitutionally assumed to delete and to integrate January 1, 1952, without warrant therefor under the Fourteenth Amendment, the parties having validly contractually fixed time termination and performed pursuant thereto.

That which was to be transported under said leases was:

> "* * * Lessee's manufactured products and commodities as well as cullet and other supplies, from its said factories and between and along locations situated in the territory in which Lessee operates, all such products, commodities, cullet and supplies being the property of the Lessee; * * *."

Thereunder said Lessee was without power to transport aught else, and the right to and profit from transportation of other materials was exclusively the property of petitioners, wherefor compensation had to be in accordance with their consent. The estate of said Knox of Mississippi in said property of petitioners was thereby contractually placed beyond Mississippi's power by the Fourteenth Amendment and yet said Majority Opinion unconstitutionally assumed to vouchsafe Knox of Mississippi, contrary to its express contract as expressly made and lawfully performed, an additional right as to the transportation of third parties' property, the Majority Opinion unconstitutionally assuming to make effectual this right thus, p. 828:

> "* * * Those latter shipments were made possible entirely through the *improper* leases to complainant, which arranged for the back-hauls, * * *."

The consideration for said exclusive utilization by Knox of Mississippi and of Knox of Pennsylvania was:

> "to pay to Lessor for the rental of said motor vehicle and equipment a sum equal to the published carload freight rate on all tonnage for which said vehicle and equipment is used to transport and with the right to first deduct therefrom the following: * * *."

Under this precise contractual obligation thus to pay, it was beyond Mississippi's power under the Fourteenth Amendment to assume to substitute any other consideration payable in any other manner. *Perry* v. *United States*, 294 U.S. 330, 79 L.ed. 912; *Hepburn* v. *Griswold*, 75 U.S. 603, 19 L.ed. 513, although somewhat limited in other aspects in *Normal* v. *Baltimore & O.R.Co.*, 294 U.S. 240, 79 L.ed. 885.

The transmutation of these lease contracts substantially into a contract of sale after the lessee had enjoyed the property in accordance with the terms of the lease for as much as five year is that which, with deference, may not be judicially accomplished, even by this Court.

III

The action of Chief Justice McGhee, Judges Hall and Kyle, imposing an obligation upon petitioners as at October 18, 1951, was likewise unconstitutional, for these additional reasons. They apply to all corporate business. The sweep of the judicial action is sought to be made universal. We ask their condemnation through stressing a particular corporate action.

(1) Knox of Pennsylvania, upon the death of Roy, established a memorial valued at $100,000 for that which he had done and yet Mississippi's Court assumes to deny to Knox of Pennsylvania the right thus to appraise Roy's services.

Compare *West Ohio Gas Co.* v. *Ohio Pub. Utilities Commission* (1935), 294 U. S. 63, 72, 79 L.ed. 761, 769:

> "* * * Good faith is to be presumed on the part of the managers of a business. Missouri ex rel. Southwestern Bell Teleph Co. v. Public Serv. Commission, 262 U. S. 276, 288, 289, 67 L. ed. 981, 985, 986, 43 S. Ct. 544, 31 A.L.R. 807. In the absence of a showing of inefficiency or improvidence, a court will not substitute its judgment for theirs as to the measure of a prudent outlay. Banton v. Belt Line R. Corp. 268 U. S. 413, 421, 69 L. ed. 1020, 1026, 45 S. Ct. 534; * * *."

Our flat position is that as to this question of management, under the authorities, supra, there is no justiciable issue and it was grossly, with deference, improper for the Majority to express an opinion over that whereasto no power in them was. If Knox of Pennsylvania, pursuing that which was best, determined thus to lease, that action was not subject to judicial review when performed by its officials in good faith and for value. We quote from the majority opinion thus, 89 So. 2nd 816:

> "* * * The directors and stockholders in Knox of Pennsylvania left the business and policies of the Knox companies to Roy without dissent. He was the policy-maker by the consent and acquiescence of the stockholder, Knox of Pennsylvania, and he was the man who decided and established the Knox policy against company ownership of over-the-road trucks. Nor does the evidence indicate that this decision was affected by any bad faith or fraudulent purpose on his part. * * *."

When these trucks were thus moving over the road between October 15, 1951, and January 1, 1952, these three Judges could not segregate a date at which that which was prece-

dently valid became void. "Modus et conventio vincunt legem", *Broom's Legal Maxims*, p. 689; and yet these three Judges would assume to make the law superior to the express provisions fairly and freely entered into especially without a hearing. Such, with deference, may not be. The alleged disability of a fiduciary is always a shield, but never a sword.

(2) Petitioners' right under the direction and control of Roy R. Underwood's powers of attorney as President of both companies and as a director in both companies was not adverse to the companies, for he had no purpose other than company-welfare—owning slightly less than one-third of the stock. From his viewpoint, that done was financially successful and made savings of thousands of dollars by reason of over-the-road leases. The determination of such a question in such an empire operation, with deference, could not constitutionally have been reversed under Mississippi's sovereignty.

(3) Petitioners categorically deny the declaration of these three Judges that on the death of Roy R. Underwood, 89 So. 2nd 818:

> "they were free from the undisputed policy previously made by Roy R. Underwood, which forbade the use of company-owned trucks. C. R. Underwood, upon assuming the presidency of both corporations, and E. F. and J. H. Underwood clearly had the duty at that time to cancel these leases, and either to buy trucks for the corporation, or to negotiate at arm's length with lessors not connected with the corporation, or to obtain competitive bids from public contract carriers, or otherwise to make a reasonable effort to obtain the best transportation contracts that they could for the complainant corporation. It was their duty to cancel the leases to eliminate the large personal profits which were being made on them by them as fiduciaries, by members of

their family and close personal friends and business associates."

But Roy had known, from the viewpoint of a disinterested President and stockholder, each of these facts and many other facts whereof these Judges were wholly ignorant and knowing these facts, as the czar, had solved the distribution problem for five years with apparently increasing success. That which this Majority says these petitioners had to do was as at January 1, 1952, to abandon completely the policy precedently existing. Visualize, with deference, the fallacy. Contracts predating Roy's death had been made. Parties, when they contract, are bound, and, in order to crucify these petitioners, it was essential that these three Judges establish absolute freedom to act and then that they follow a prejudged course determined by the Majority to be productive of "profits." The profit motive may actuate the owner, but it may never, contrary to the will of the owner, actuate a court. As officers and directors of this subsidiary, the law, with deference, is manifest that the Court could not compel an election, but, admitting for the sake of argument, that the owner had lost his right to dominion that which these Judges require is a resolution in the following form:

> Be It Resolved by the Board of Directors of Knox of Mississippi, wholly owned subsidiary of Knox of Pennsylvania whose directors hereasto have not acted, though competent so thus to do, that
>
> Whereas, upon the 16th day of October, 1951, the founder and President of this Company was accidentally killed, having brought this corporation to its present state of affluence through his policy of over-the-road leases made with J. G. and C. H. Smith, J. M. Patten, C. R. Underwood, F. C. Hicks, J. H. Underwood,

Hutco, Mrs. Florence P. Underwood, C. Alberta Luter, J. H. Underwood, Trustee, E. F. Underwood, Trustee, Smith & DeViney, Elizabeth R. Smith, and George B. Underwood, as well as other acts considered appropriate under his genius for management; and

WHEREAS, Knox of Pennsylvania has appropriated $100,000 as a memorial to him and his work for these corporations;

NOW, THEREFORE, BE IT RESOLVED, that these directors, having considered said policy of Roy R. Underwood, do find the same manifestly erroneous and improper; and, notwithstanding this corporation is wholly owned by Knox to Pennsylvania and the ratification of the corporation hereasto taken whereunder the acts of its officials have been unanimously approved, we do unqualifiedly condemn that policy and do declare that from and after this date all leases of trucks be cancelled, annulled and for naught held as of the date of their execution; and we do declare that this resolution is passed having in view not the general welfare of the Knox glass empire, but exclusively the well-being of this individual company. We do require that each lessor above named do forthwith refund to this company all rentals received, less depreciation, and that appropriate suits therefor, if payment be not made, be forthwith filed, all of said lessors, including said Roy R. Underwood thus memoralized, having been found by this Board to be joint tort feasors thereasto with a liability beginning May 25, 1946; that the entries upon the books of this Company of these rentals as lawful deductions be reversed and that this Company (we make this assumption) having been on the accrual basis do forthwith pay Federal and State income taxes upon this augmented basis in order to stop further interest

and potential penalties; but the directors so passing this resolution having precedently thereasto acted in good faith and under the direction of Knox of Pennsylvania, the passage of this resolution is without prejudice as against them or any of them in the suits which may be against them brought for that by them thus done as to such leases; and, individually, none of them believe that Roy R. Underwood hereasto made an error. Further, that this Board recommend to Knox of Pennsylvania that the memorial for Roy R. Underwood be set aside and the amount applied to his liability as a tort feasor, if he is to so be.

This resolution illustrates the extent of the constitutional transgressions vacating ratification intelligently passed by Knox of Pennsylvania. Compare the resolution actually passed, A.R., 151.

Each of these lessors-employees thus accused of being a tort feasor, jontly and severally liable for all of these amounts, would not for a moment acquiesce therein—and properly so—but they would have without doubt severed their connections and gone elsewhere for employment, this wiping out completely the executive force that had made the phenomenal success. Each of these parties would have been bound to admit himself to be an unfaithful steward and would have forthwith, had they acquiesced, been compelled to file a claim for income taxes paid to the Federal Government for a period of three years because they could not go back further, and allege as a basis of the refund a self-confessed fraudulent situation. Knox of Mississippi on the contrary, had made false entries when during this entire period is claimed as lawful the amounts paid as rental for these trucks and was compelled to reverse its entries and admit liability for these alleged profits both those assumed to be recovered as was attempted in this

suit, as well as to abandon, after January 1, 1952, its system of claiming these rentals as deductions. Presumptively had they so elected to call themselves unfaithful stewards, Knox of Mississippi would have made its income tax return on a basis of the earnings of these trucks, if it had had any glass to distribute. Such an upheaval in personnel is not adverted to by the Court in its opinion and how such a condition could have escaped attention, with deference, passes understanding; but even if Knox of Mississippi had acquired a new and better set of officers and had made the profits that the Court spread out in this opinion, the amount which Knox of Mississippi would have had would have been, not the amount set out, but approximately 40% thereof, deducting as it must both State and Federal income taxes, and, if there were a distribution to Knox of Pennsylvania, possibly an additional amount. We have not expressly integrated depreciation, but admit its existence and its necessary effect. Frankly, taxes condition business success, and why Roy R. Underwood chose truck leasing as contradistinguished from truck ownership may well have lain in the field of taxation and yet no attention whatsoever was assumed to be given thereto, but the bland declaration is that the situation would have been precisely the same, which indicates, with deference, why Judges should not burden themselves with attempting to run businesses.

Roy R. Underwood was not killed until October 16, 1951, and he thus had before him, as shown by the opinion in chief, full details as to the amount of these profits during 1948, 1949, 1950 and up to October 16, 1951. He well knew all possible reasons for changing from leasing to ownership, and with that full knowledge decided that leasing best conserved the welfare of the Knox empire. With deference, these Judges would have much difficulty in explaining, with the earnings as great from 1948 to 1952 as they were

from 1952 up to 1954, why they should approve Roy's judgment up to January 1, 1952, and repudiate it from that day forward. In order to be consistent, three of the Judges said there was no difference, but truck ownership during the entire period was, under the evidence, essential. The other three, with precisely the same evidence, said "We will sever and divide the period by the death of Roy, who was a mere individual and in no sense the corporation". So, with this inconsistency between these two classes of Judges, we have a fundamental disagreement as to management with each assuming, under the same factors, to arrive at different results. With deference, this situation demonstrates that the concurring of three Judges with those who would affirm up to January 1, 1952, and after January 1, 1952, concur with those who would reverse, constitutes, it is respectfully submitted, substantially a compromise verdict, for which, with deference, no valid reason may be given.

That which is unconsciously overlooked is that the contract rights of petitioners were fixed prior to the death of Roy and at a time when between them and the corporation there was absolutely no fiduciary relationship whatsoever, But when, after the death of Roy, there was established between petitioners and Knox of Pennsylvania a fiduciary relationship, that relationship did not compel those who had valid agreements with Knox of Mississippi to reduce the compensation thereunder payable and to acknowledge by reason of the later acquisition of the fiduciary capacity, a different consideration lesser in amount than that which had precedently been validly fixed. When contract liability was ante the fiduciary relationship, then that contract was a contract post the fiduciary relationship; and since Knox of Pennsylvania was the dominant corporation, if it sought, after the fiduciary relationship arose, to require

that the contract be altered, both Knox of Mississippi and Knox of Pennsylvania were compelled to proceed in accordance with the provisions of the contract which had a valid origin.

Assume as we must that before C. R. Underwood assumed any fiduciary relationship to Knox of Pennsylvania, valid leases had been executed under the direction of Roy Underwood. Thereunder, C. R. Underwood had certain rights and when he accepted the position of trust, our contention is that such an acceptance did not terminate contract obligations and substitute in lieu of the amount thus specifically payable another and further amount computed upon a tort responsibility.

IV

The Federal questions having been raised specifically in the suggestions of error, the same arguments thereasto hereinabove set forth are reiterated by reference and not repeated.

V

Notwithstanding *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill,* 281 U.S. 673, 74 L. ed. 1107, the Supreme Court of Mississippi, under Section 146 of the Constitution of Mississippi, was of limited jurisdiction, being restricted exclusively to that of an appellate tribunal. *Swaney* v. *White,* —— Miss. ——, 92 So. 2nd 453 (Adv. Sh.); *Planters Ins. Co.* v. *Cramer,* 47 Miss. 200. As held in *Love* v. *Mississippi State Board of Veterinary Examiners,* —— Miss. ——, 92 So. 2nd 463 (Adv. Sh.), the right to a hearing "embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them." When the several Judges thus rendered the separate opinions whereunder, with deference, there were integrated factors which required decision here, a proper

hearing was essential to present these questions thus originated by said divergent views so as that thereasto the appropriate constitutional determination might be. Without this additional proof thus rendered requisite for the first time, petitioners would be bereft of that to them given unconditionally by the Constitution. The course to be pursued is accurately expressed in *West Ohio Gas Co.* v. *Ohio Pub. Utilities Commission*, 294 U.S. 63, 77, 79 L. ed. 761, 772:

> "* * * To put into the case now an issue heretofore kept out of it and thereby reach another value would be a denal of a full and fair hearing by the tribunals of the state, a denial forbidden by the Constitution of the nation. If the appellee may be heard to say that during some part of the term the valuation was too high, the company must be free to urge that at other times it was too low. Upon the record now submitted to us no such issue is involved. To bring it into the case at all there is need of a new hearing with a new reckoning of the rate base, unhampered by restrictions to any single point of time. Only in that way can review be full and fair."

Embraced within this constitutional right is the right to amend and supplement the pleadings so as to bring into sharp focus the invasions of all those clauses of the Federal Constitution which precedently had not been invoked because there was no dream that they would be fundamentally transgressed as hereinabove set forth.

There was no intimation that the acts of Roy Underwood and C. R. Underwood, fortified by ratification, were assailable by the corporation which authorized that being done.

Under the foregoing arguments, it is respectfully submitted that where as here, by that done by this judicial

division in the Supreme Court, petitioners were substantially placed, quoad these constitutional questions, as though they had been in contempt of the court, *Hovey* v. *Elliott*, 167 U.S. 409, 42 L. ed. 215. On the remand specifically made by the Supreme Court of Mississippi, they were, under the Constitution and statute of Mississippi, authorizing amendments to be liberally made (Section 1302, *Mississippi Code of 1942*, as amended), entitled to amendments effectually presenting all constitutioal question as to:

(a) All matters relevant in controversy.

(b) The sufficiency of the time between October 18, 1951, and the date whereat action had to be taken by the subsidiary officials whether to acquiesce in or renounce the policy of the parent corporation.

(c) A determination of the rental which petitioners were entitled to recover.

(d) Isolating Knox of Mississippi from the integrated Knox empire and confusing the issue in the Supreme Court by alleged misfeasance by Knox of Pennsylvania.

The petitioners had a right on this hearing thus to be had to know that which would be presented contra, *Love* v. *Mississippi State Board of Veterinary Examiners*, ——, Miss. ——, 92 So. 2nd 463 (Adv. Sh.), supra. The Court could not act upon personal knowledge not lawfully introduced. *Gillespie* v. *Doty*, 162 Miss. 684, 135 So. 211.

Petitioners were deprived of all right to introduce evidence as to items (b), (c) and (d) above, and there is not one scintilla of evidence in the record as to the basis for selecting January 1, 1952, as the date whereat petitioners were compelled to renounce.

VI

That here at issue is the right of Mississippi's Court to strike down the good faith business judgment of management years after it was made.

VII

Since J. H. Underwood did not become an officer until March 1, 1952, and director in May 1952, there was a violation of the Constitution when the Majority Opinion assumed to impose a several obligation as to that whereover he was with authority, being a resident of Palestine, Texas. The imposition was for amounts received as Trustee for Sandra Ann Underwood between January 1, 1952, and March 2, 1952. See paragraph 1 of the judgment, but see 89 So. 2nd 830.

We are mindful that the Majority Opinion assumes to impose an obligation by reason of a participation in the alleged fraudulent diversion of corporate assets. No imposition was made upon Hester, DeViney and Smith, all of whom quoad this aspect, were equally tort feasors if J. H. Underwood so was. He did not, as he contends, accept the office nor the directorate at the times shown, but whether so or not, the Court did not allow him a single day within which to investigate and find out that which was, according to the Supreme Court of Mississippi, requisite and necessary, as was done in the case of C. R. Underwood and E. F. Underwood, when the allowance was from October 18, 1951, until January 1, 1952, which would give to him a date of liability imposition in July, 1952. This illustrates the danger of arbitrarily fixing a date to impose liability.

VIII

The majority opinion assumed to make an issue of the alleged character of Miss C. Alberta Luter and, pursuant thereto, in a civil proceeding, imposed quasi-criminal liability, but the Chancellor found, A.R., 78:

"* * * The evidence fails to show, however, that any of the other defendants had any knowledge of or par-

ticipated in any way in these acts of misconduct and breach of duty by these two defendants to the complainant corporation. It is the considered opinion of this Court that these acts of misconduct, established by the evidence as heretofore outlined, on the part of the defendants C. R. Underwood and C. Alberta Luter constituted acts which had no connection or any bearing whatsoever on the truck leases in question. The complainant corporation has or had full, complete and adequate remedies against these two defendants for any acts of misconduct and breaches of duty of which they were guilty."

The evidence shows that the shortage was made good so that Knox of Mississippi suffered not one penny's worth of damage therefrom. The record further reflects by incompetent testimony that C. R. Underwood arranged to assist this long time employee in the hour of trial; and, further, that Roy R. Underwood was fully advised of that which had occurred and asserted, quoad the transaction, the plenary power vested in the 100% proxy. When Roy R. Underwood and C. R. Underwood, as well, had full knowledge hereasto, it was for them on behalf of the corporations and not for the Supreme Court to admeasure liability by reason thereof. The Constitution is like the rain, both upon the just and the unjust. The character, in a civil cause, is absolutely incompetent. *Leinkauf & Strauss* v. *J. R. Brinker,* 62 Miss. 255, wherein there was a reliance placed upon a statement in 1 *Greenleaf on Evidence,* Sec. 54; *Quinn* v. *Louisville & N.R. Co.,* 144 Miss. 505, 110 So. 436; *Graves* v. *Johnson,* 179 Miss. 365, 176 So. 256; and "Annotations" in 33 *A.L.R.* 1220, 48 *A.L.R.* 249, and 78 *A.L.R.* 643.

Mr. Justice Black in dissenting in *National Union of Marine Cooks & Stewards* v. *Arnold,* 348 U.S. 37, 47, 99 L.

ed. 46, 53, most appositely has remarked that which is fundamentally sound constitutionally:

> "* * * From the beginning, due process and equal protection have meant that every defendant must be permitted to defend himself in any court where his antagonist can appear and prosecute. This right of defense belongs to all — good or bad, one who has violated laws the same as one who has not. * * *."

Sp. *Michel* v. *Louisiana*, 350 U.S. 91, 104, 100 L. ed. 83, 94, dissenting opinion of Mr. Justice Black.

When one charged with a crime is thus so securely protected under the Constitution, it is respectfully submitted that this petitioner is entitled to equal protection and that no more important question could exist than this, namely: May liability vel non for a tort be determined by whether the doer was saint or sinner? The Constitution extends to every person.

IX

Under this Point IX, we have eptomized the objections under all of the sections of the Federal Constitution and submit that the end result attained by the majority in the State Supreme Court is state action and is so arbitrary and capricious as to contravene.

When Roy Underwood dreamed that store door delivery would efficiently effect glass distribution, he visualized that it could be best accomplished by equalizing the incentive compensation between the personnel who controlled manufacture and those who controlled sales. The Court has denied that right by making the minor officers deliver the glass without cost to Knox of Mississippi and to their destruction, even though there had been a voluntary performance of these contracts for more than five years.

He next sought effectuation through a uniform contract

wherein all by him deemed essential was integrated. The majority has stricken this down, without cause, and as the end result we find Judges Gillespie, Holmes and Etheridge characterizing that thus by him done to be so erroneous and improper as that in thus increasing the business he became a tort feasor and liable as such. Mr. Chief Justice McGehee and Judges Hall and Klye, with deference, did a bit of judicial legislation, assuming to create a tort liability after January 1, 1952, while admitting that precedently petitioners were without responsibility. Most horrible of all is the impairment of private incentive, for six judges denied him the right to contract—not in futuro, but after more than five years' meticulous performance, with payment of Federal taxes borne in virtue of the provisions in the leases. It would have been, with deference, unconstitutional if this declaration had been as to the future so that petitioners might have avoided it, but when it was after performance the result as almost beyond constitutional contemplation.

References to Appendices

1. The opinion of the Chancellor of Hinds County is Appendix "A" hereto.

2. The opinions of the Supreme Court of Mississippi are Appendix "B" hereto.

3. The opinion of the Supreme Court of Mississippi on Suggestion of Error is Appendix "C" hereto.

4. The final decree of the Chancellor of Hinds County is Appendix "D" hereto.

5. The judgment of the Supreme Court of Mississippi is Appendix "E" hereto.

6. The judgment of the Supreme Court of Mississippi overruling suggestions of error is Appendix "F" hereto.

7. The order of the Supreme Court of Mississippi overruling motion to stay mandate is Appendix "G" hereto.

Prayer & Conclusion

Herein, in Mississippi's Court, petitioners moved (a) for a stay, pending filing of this application, and (b) for transmission of certain original documents, requisite to proper appreciation by this Court of the questions herein, the same appearing in original form so as to be inconvenient to copy and not as intelligible as in their original form. This motion appears in the record (A.R., 156), and was by the Supreme Court of Mississippi overruled on the 18th day of March, 1957, without assigning therefor any reason. Petitioners herein renew said motion for an order, requiring the transmission of said exhibits appearing in the record in said Supreme Court of the State of Mississippi and for an order staying the issuance of a mandate in said Supreme Court of the State of Mississippi or for a stay as to pleas and proceedings in the Chancery Court of Hinds County, First District, Mississippi, if this writ be granted. Compare 63 stat. 104, c. 139, Sec. 106, (Sec. 2101, Title 28 *U.S.C.A.*, p. 67).

WHEREFORE, petitioners respectfully pray for the issuance of this writ to said Supreme Court, and, likewise, for an order, if it be granted, to transmit said original exhibits for consideration by this Court, and if it be granted, to stay the mandate until this Court shall thereasto make such order as to this Court may accord with the Constitution.

Respectfully,

WM. HAROLD COX,
GARNER W. GREEN, SR.

GREEN, GREEN & CHENEY,
809 Electric Building,
Jackson, Mississippi,
Of Counsel.

(5082-3)

A/17

Office - Supreme Court, U.S.
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MAY 1 1957
JOHN T. FEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 959

C. R. UNDERWOOD, ET AL.,
Petitioners,

v.

KNOX GLASS BOTTLE COMPANY, ET AL.,
Respondents

APPENDIX TO PETITION FOR CERTIORARI

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APPENDIX "A"

KNOX GLASS BOTTLE COMPANY, ET AL.,
Complainant

v.

C. R. UNDERWOOD, ET AL.,
Defendants

OPINION OF THE CHANCERY COURT

The Court having heard and considered the abundance of evidence presented on the hearing of this cause, and having read and carefully considered the briefs submitted by Counsel representing all parties, makes the following findings of fact and conclusions of law, to-wit:

The complainant corporation, Knox Glass Bottle Company of Mississippi, was organized under and by virtue of the laws of the State of Mississippi during the month of April, 1933 and the first organization meeting of said corporation was held on or about April 5, 1933 at which time Roy R. Underwood, now deceased, the brother of defendant C. R. Underwood, was a director of and the Secretary and General Manager of Knox Glass Bottle Company of Pennsylvania. At the organization meeting of Knox Glass Bottle Company of Mississippi on April 5, 1933 the said Roy R. Underwood was elected a director of and the President of the complainant corporation, Knox of Mississippi, in which capacity he served until his death on or about the 16th day of October, 1951. In 1934 the said Roy R. Underwood became President of Knox of Pennsylvania. At all times throughout his long association with Knox of Pennsylvania, and while serving as President and a

director of Knox of Mississippi, the said Roy R. Underwood resided in the State of Pennsylvania. The said Roy R. Underwood grew up in the glass manufacturing industry and was well versed in all phases of the art of manufacturing and distributing glass wares. He was a man of strong will, rather domineering in nature, and exercised his authority as President and General Manager of the Knox empire with unusual skill and ability. It is extremely clear from the evidence before the Court in this cause that the said Roy R. Underwood, during his lifetime, exercised almost complete domination and control over the entire Knox empire; that he was the person upon whom the Board of Directors of Knox of Pennsylvania relied to make the policies for the operations and to direct the affairs of the Knox empire. Although there was a Board of Directors of Knox of Pennsylvania and of Knox of Mississippi, it is clear that these Boards of Directors served only in a perfunctory manner, leaving unto Roy R. Underwood the matter of making all major decisions concerning the operations of the Knox plants. The said Roy R. Underwood, during his tenure as President of the complainant corporation, visited in person the Jackson, Mississippi plants only on infrequent occasions, usually for the purpose of attending annual stockholders' meetings and meetings of the Board of Directors. However, he maintained almost daily contact with the complainant corporation by telephone and correspondence.

The defendant C. R. Underwood, a younger brother of the said Roy R. Underwoood, was elected a director of complainant corporation at the organization meeting on April 5, 1933, and remained on the Board of Directors until his ouster and/or resignation on Thanksgiving Day, November 26, 1953. During a portion of this time the said

C. R. Underwood was also a director and officer of Knox of Pennsylvania. From May 29, 1934 until November 19, 1951 the said C. R. Underwood was a Vice-president of complainant corporation, resided in Jackson, Mississippi, and was in active management and executive control of the complainant corporation, subject to the directions and orders of Roy R. Underwood, the President. On November 19, 1951, following the death of Roy R. Underwood on the 16th day of October, 1951, the said C. R. Underwood was elected President of the complainant corporation and President of Knox of Pennsylvania. Thereafter the said C. R. Underwood was a director and the President of the complainant corporation and Knox of Pennsylvania until his ouster and/or resignation on November 26, 1953. During the same period, from November 19, 1951 until November 26, 1953, the said C. R. Underwood was in active control of the business of complainant corporation as well as Knox Glass Bottle Company of Pennsylvania.

The defendant E. F. Underwood, who is one and the same as Edmirl Fair Underwood, is a son of the said C. R. Underwood and was a director and officer of complainant corporation from April 17, 1939 until his resignation in November, 1953. The said E. F. Underwood was Vice-president of complainant corporation from April 17, 1939 until July 26, 1941, at which time he was elected Vice-president, Treasurer and Assistant Secretary, and the said E. F. Underwood held those offices until May 5, 1952, at which time he was elected Vice-president, Treasurer, Assistant Secretary and Assistant General Manager, and continued to hold such offices until June 18, 1953 at which time he was elected Executive Vice-president and Treasurer of complainant corporation and held such offices until his resignation in November, 1953. The said E. F. Underwood is now and has for a considerable period of time been a di-

rector of Knox of Pennsylvania, having last been elected as director of said corporation on December 1, 1953. The said defendant, E. F. Underwood, is the trustee of a certain trust created by the defendant C. R. Underwood for the benefit of the defendants Mary Ann Underwood and E. F. Underwood, Jr., a minor daughter and minor son respectively of the said E. F. Underwood.

The defendant J. H. Underwood is a son of the defendant C. R. Underwood, and was a director of the complainant corporation from May 5, 1952 until his resignation in November, 1953. Said J. H. Underwood was also a Vice-president of complainant corporation and Plant Manager of the plant at Palestine, Texas from March 1, 1952 until June 18, 1953, at which time he was elected Vice-president and Assistant Treasurer of the complainant corporation. He served in this capacity from said date until his resignation in November, 1953. The defendant J. H. Underwood is also a trustee under a certain trust created by C. R. Underwood for the benefit of defendant Sandra Ann Underwood, the minor daughter of the said J. H. Underwood.

The defendant Florence P. Underwood is the wife of C. R. Underwood.

The defendant G. B. Underwood is a nephew of the said C. R. Underwood and was a director and Vice-president of complainant corporation from December 4, 1951 until December, 1953. The said G. B. Underwood was, during certain periods of time complained of in the Original Bill, a director and Executive Vice-president of Knox of Pennsylvania. The said G. B. Underwood is a non-resident of the State of Mississippi, residing in the State of Pennsylvania, and no personal service of process was ever had upon him in this cause, and on motion of the complainant made at the commencement of the hearing on the merits of

this cause, said Bill of Complaint was dismissed as to the defendant G. B. Underwood.

The defendant F. C. Hicks is a nephew by marriage of the said defendant C. R. Underwood, and was a Vice-president of complainant corporation and the Plant Manager of the Palestine, Texas plant from December 23, 1951 until March 1, 1952. The said F. C. Hicks is a non-resident of the State of Mississippi and no personal service of process was ever had upon him in this cause, and on motion made by the complainant at the commencement of the hearing of this cause on its merits, the Original Bill of Complaint was dismissed as to the defendant F. C. Hicks.

The defendant C. Alberta Luter was an employee of Dixie Glass Bottle Company at the time the assets of said corporation were purchased by the complainant corporation, Knox Glass Bottle Company of Mississippi, in the year 1933, and soon after the commencement of the operation of the complainant corporation, the said C. Alberta Luter became and has remained the personal Secretary and close personal friend of the defendant C. R. Underwood. Said defendant C. Alberta Luter was Assistant Secretary and Assistant Treasurer of the complainant corporation from April 5, 1934 until July 26, 1941, at which time she was elected Secretary and Assistant Treasurer, in which capacity she remained until January 23, 1951. Said defendant C. Alberta Luter was a director of complainant corporation from July 26, 1941 until January 23, 1951. She is presently employed by Flowood Corporation as the personal Secretary of the said C. R. Underwood, the President of said corporation.

The defendant W. E. Hester, Jr., was a partner of the defendant E. F. Underwood, doing business under the partnership name of Hutco, which owned and leased to complainant corporation certain motor vehicles complained

of in the Bill of Complaint. Said defendant W. E. Hester, Jr. is also an officer and director of Motors, Inc., a Mississippi corporation, which operates a distributorship of White trucks, tractors and trailers in or near the City of Jackson, Mississippi, and sold many of the motor vehicles to complainant corporation and to the indivdual defendants. In addition to the defendant W. E. Hester, Jr., the stock of Motors, Inc. is owned principally by the defendants E. F. Underwood, J. H. Underwood and Florence P. Underwood.

Knox Glass Bottle Company of Pennsylvania owned all of the capital stock of the complainant corporation, Knox Glass Bottle Company of Mississippi, from its inception and throughout the period of time complained of in the original Bill, and during the lifetime of Roy R. Underwood he was given by the stockholders of Knox of Pennsylvania, and held throughout the period of time he served as President of the complainant corporation, a full, complete and unlimited power-of-attorney to vote all of the stock which Knox of Pennsylvania had in Knox of Mississippi, and as heretofore stated, Knox of Pennsylvania owned all the capital stock of Knox of Mississippi. The only other shares of stock which were ever issued by Knox of Mississippi were certain qualifying shares to certain officers and directors. The certificates covering these qualifying shares were held by Knox of Pennsylvania and were never actually the property of the officers and directors in whose names they were issued.

The complainant corporation, Knox Glass Bottle Company of Mississippi, operated two glass manufacturing plants in Rankin County, Mississippi, one glass manufacturing plant in Palestine, Texas, and one glass manufacturing plant in Gas City, Indiana.

It is clear from the evidence introduced in this cause, and

the Court so finds, that it was the intention of the organizers of the complainant corporation to engage in the business, and solely in the business, of manufacturing glass wares as is evidenced by the provisions of the original charter of incorporation. Incidental to the manufacture of the glass wares which complainant corporation intended to offer for sale to the consuming public, it became and was necessary from its inception to deliver its manufactured products to its customers. In the early days of its operation, complainant corporation apparently delivered the great bulk of its products to its customers by common rail carrier. Later a substantial portion of its products was shipped by common motor carrier, and for a period of many years complainant's customers have picked up at its plants a substantial portion of the products which have been manufactured and sold.

It is clear from the evidence, and the Court so finds, that the organizers and officers and directors of complainant corporation had no intention at the outset of purchasing its own trucks for the purpose of delivering its manufactured products and hauling the necessary materials and ingredients to the plants for the manufacture of the glass wares. In about the year 1946, however, we find from the evidence that complainant corporation purchased four (4) tractor and trailer units which were used in the delivery of its products to its customers and in hauling materials and supplies to its plants. The Court finds from the evidence that the purchase of these four (4) trucking units was made by the defendant C. R. Underwood without the permission or consent of Roy R. Underwood or any other person or persons.

Sometime in the Fall of the year 1947, J. G. and C. Horton Smith purchased a tractor and trailer unit and leased the same to complainant corporation under the terms of a

written contract, which contract provided that the complainant, lessee, would pay to the lessors the current carload freight rates in hauling its manufactured products to its customers and hauling material and supplies from various points to the plants of complainant. Subsequently, complainant corporation purchased five (5) additional tractor and trailer units to be used in transporting its wares, and over the period from about December, 1947 to July, 1953 leased twenty (20) additional truck and trailer units under substantially the same terms and conditions as set forth in the lease between J. G. and C. Horton Smith and complainant, the lessors of said leases being as follows:

Meridale, Inc.	One (1) unit,
J. H. Underwood	One (1) unit,
Hutco	Three (3) units,
Florence P. Underwood	Two (2) units,
C. Alberta Luter	Four (4) units,
C. R. Underwood	Six (6) units,
J. W. Smith & H. B. DeViney	One (1) unit,
G. B. Underwood	Two (2) units.

Over the period of years in question, all of these lessors realized substantial profits which were paid by the complainant corporation to them for the use of these trucking units.

It is the contention of the complainant corporation that, because of the fiduciary relationship which existed between the defendants C. R. Underwood, E. F. Underwood, J. H. Underwood and C. Alberta Luter as officers and directors of the complainant corporation, and because of the close family relationship which existed between these officers and directors and the other defendants, Florence P. Underwood, W. E. Hester, Jr., and J. H. Underwood, Trustee for Sandra Ann Underwood, and E. F. Under-

wood, Trustee for Mary Ann Underwood and E. F. Underwood, Jr., all of the profits paid to these defendant lessors for the use of their trucking units should be repaid to the complainant, it being the contention of complainant corporation that, because of the fiduciary relationship of these defendants to the corporation, a constructive trust was created whereby all of the trucking units which were leased by these defendants to the complainant corporation were in fact property of the complainant and the corporation was entitled to all of the profits made by the operation and use of said trucking units.

In order for the complainants to prevail under this theory and contention, it is the opinion of this Court that it must be established by the facts that the defendants have used their positions with the complainant corporation to overreach the corporation and its stockholders and through acts of bad faith to have become unjustly enriched to the exclusion of and at the expense of the other stockholders.

There is absolutely no dispute on the question of the fiduciary relationship which existed between the complainant corporation and the defendants C. R. Underwood, E. F. Underwood, J. H. Underwood and C. Alberta Luter during the periods of time in which these defendants were officers and directors of the complainant corporation, and that under and by virtue of the fiduciary relationship which existed during such periods of time, the defendants were under a duty to administer the corporate affairs for the common interest and benefit of all of the stockholders.

There is closely allied with the above set forth contention of the complainant as a basis for recovery in this suit the contention that the defendants have wrongfully deprived the complainant of a corporate business opportunity in which it had a legitimate and vested or expected interest by purchasing and leasing to the complainant corporation

the trucking units in question and making the profits for themselves rather than for the corporation.

The complainant corporation argues that the question of good or bad faith on the part of the defendants in the leasing of the trucks in question to the corporation, the question of whether or not the operation of these trucks was beneficial to the corporation, the question of Roy R. Underwood's knowledge of the operations of the trucks, and the question of whether or not there had been any ratification or acquiescence in the trucking operations, except by the consent of the stockholders of Knox of Pennsylvania given with full knowledge of the facts, should not be considered by this court. This Court, being a Court of equity, a Court of conscience and a Court which is charged with the responsibility of administering justice, cannot go along with this argument.

A close examination of the facts as disclosed by the evidence, both oral and documentary, which has been introduced on the hearing of this cause, shows, and this Court so finds, that the complainant corporation actually benefited to the tune of many thousands of dollars by the operation of the fleet of trucks in question as a result of having its manufactured products delivered to its customers at a cost based on carload freight rates established by common carrier, when in many, many instances shipments were made of less-than-carload lots and would have cost much more had they been handled by common carrier, and there is absolutely no doubt in the world but that the volume of business of the complainant corporation was greatly increased as a result of this trucking operation which enabled it to deliver its manufactured products to its customers at points not easily accessible by by common carrier with dispatch and in keeping with the urgent demands of its customers. It is further shown conclusively by the evidence that the complainant corporation greatly bene-

fited from this trucking operation by being able to transport necessary supplies and equipment from points over the country to its various plants on return trips. Taking the soda ash truck alone, which was leased to the complainant corporation by Hutco, the partnership of E. F. Underwood and W. E. Hester, Jr., it is a fact established by the evidence that the use of this truck brought savings to the corporation over the five year period in question of approximately $174,431.80. All of the evidence concerning the use of this truck, which was conceived by the defendant W. E. Hester, Jr., shows that the defendants had foremost in their thinking the interest of the complainant corporation, even though ultimately the defendants, W. E. Hester, Jr., and E. F. Underwood, realized substantial profits from the operation of this particular truck.

The evidence, as hereinabove stated, clearly shows that C. Horton Smith, presently serving as Vice-president and General Manager of the complainant corporation and the man who signed the Bill of Complainant in this cause, was the first to lease a truck to the complainant corporation. Mr. Smith testified over and over again that his lease was fair and reasonable. All other leases were patterned on the C. Horton Smith lease and the operation of all trucks was handled in the same manner, including the truck in which Mr. H. B. DeViney, now a Vice-president of the complainant corporation, had an interest, as well as the trucks owned by the complainant itself. That is to say, all of the truck leases bore the same terms and conditions, and in the matter of usage the trucks were dispatched on a "first in, first out, basis," including the trucks owned by complainant corporation, which clearly indicates that the defendants did not in this respect use their positions to promote their personal interests as against the interest of the cor-

poration at a time and under circumstances that would have been extremely easy for them to have so done.

The Court finds as a matter of fact that a substantial portion of the profits realized from the trucking operations was realized through charges made to third persons for hauling vegetables, fruits and other products on return trips after having delivered complainant's wares to its customers, arrangements for which shipments were made by the Traffic Department of complainant. (R. 3799-3800.)

On the question of whether or not the complainant corporation and the parent corporation, Knox of Pennsylvania, were or were not financially able to have purchased the trucking units, the Court finds as a matter of fact that the parent corporation, Knox of Pennsylvania, was hard pressed for operating capital and in fact was heavily indebted to various and sundry creditors throughout the period of time in question; that the complainant corporation, however, showed substantial profits and had on hand a substantial amount of operating capital throughout the period of time in question. The Court finds as a matter of fact, however, that under the terms and conditions which the trucking units could have been purchased, there was no time during the period that the trucks complained of were being leased to the complainant corporation that the complainant corporation or the parent corporation, Knox of Pennsylvania, could not have purchased these trucks themselves. This is clearly established by the testimony of Mr. C. R. Underwood which shows without dispute that Knox of Pennsylvania, under his direction, did purchase a number of trucking units after he became President of the Knox empire and at a time when the parent corporation was laboring under its greatest financial difficulty.

It is the opinion of this Court that the trucking operation complained of was not a business opportunity of the complainant corporation of such character as absolutely re-

quired the defendants to act upon and seize for the corporation. To say that the defendants were absolutely required under the circumstances to purchase a fleet of trucks for the complainant corporation to be used in the transportation of its manufactured products to its customers and to haul to its plants its necessary supplies and equipment would be to say that the officers and directors of every corporation in this country engaged in the manufacture of products requiring any substantial amount of transportation would have to purchase trucks for and on behalf of the corporation they represented, for the purpose of transporting their products. If this were the law, there would be little need in our economy for the common carrier, either rail or motor vehicle. The Court finds as a matter of fact that it was not essential to the complainant corporation's business that it own and operate the fleet of trucks in question. The Court further finds as a matter of fact that the leasing of the trucks in question by the defendants to the complainant did not constitute the usurpation of a corporate opportunity which brought the defendants in direct competition with the business of the complainant corporation. Although the evidence shows that certain expenses in connection with the operation of the trucks in question, such as employing dispatching and clerical personnel to operate the Traffic Department, were borne by the complainant corporation, the same did not constitute the employing by the defendants of the corporation's resources for their personal gain, and in fact there was no exploitation by the defendants of a business opportunity, because even though the complainant corporation had owned all of its trucks or if it had owned no trucks and had been required to use either common carrier transportation or transportation of its customers, it would have been necessary for it to have maintained a Shipping Department, expenses of which would have with-

out doubt been substantially the same as those of the Traffic Department which it maintained.

It is the opinion of this Court that the question of whether or not the trucks in question should have been purchased and owned outright by the corporation or leased by the corporation was a matter of business judgment which was left by the stockholders of the parent corporation, which owned all of the stock of complainant corporation, to Roy R. Underwood during his lifetime, and following his death to C. R. Underwood, and the proof fails to disclose clear and convincing evidence of bad faith on the part of either of these men insofar as the trucking operations are concerned.

The documentary evidence introduced on the hearing of this cause shows beyond any shadow of a doubt that full and complete records were made and kept by the Traffic Department of the complainant corporation showing the profits which were being realized from the trucks in question throughout the period of time complained of, and that this information went to the Home Office of the parent corporation in Knox, Pennsylvania; that Roy R. Underwood, as President of the Knox empire, during his lifetime knew all of the details of the trucking operations and that by virtue of the power of attorney which had been given to him by the stockholders of Knox of Pennsylvania constituting him their agent for notice, all of the stockholders of Knox of Pennsylvania, and most certainly the stockholders of complainant corporation, were charged with the full and complete knowledge of the trucking operations. There was absolutely no secret of the fact that the trucks in operation were being leased, since there were detailed written leases between the lessors and the lessee on file in the offices of the complainant corporation as well as the written reports of the monthly operations heretofore mentioned.

It appears to this Court, and the Court finds as a matter of fact, that those now in power and control of the Knox empire constitute another family group and close friends of that family group who own the controlling stock in the parent corporation, Knox of Pennsylvania, and that these people knew, or should have known had they opened their eyes, at the time of Roy R. Underwood's death and shortly thereafter when they elected to the Presidency of said parent corporation and the complainant corporation, C. R. Underwood, that the vast majority of the truck leases in question were then in existence and that the defendants were realizing a profit from such leases.

If it could be said that all of the leases between the complainant corporation and the defendants here were and did constitute voidable contracts because of the relationship which existed between the defendants and the complainant corporation, and if the stockholders were not satisfied with the truck leasing operations, why did they in fact elect C. R. Underwood to the Presidency of the corporation, execute to him the same general broad power of attorney which they had given to Roy R. Underwood, and thereby place their stamp of approval upon the business methods then in existence, including the truck leasing agreements?

The evidence shows that substantially all of the Board of Directors of Knox of Pennsylvania visited the complainant corporation's premises at its various plants after C. R. Underwood became President, that many of the directors in question were present on the premises, and said directors had every opportunity in the world to determine whether or not there was anything being done in connection with the transportation of its products which operated adversely to the interest of the stockholders of the parent corporation, and no complaint was made.

The Court further finds that, following the discharge of the defendants C. R. Underwood, E. F. Underwood and J. H. Underwood, by the complainant in November, 1953, the complainant continued to operate all of the trucks in question under the terms and provisions of the leases then in existence until February 23, 1954, and for the months of November and December, 1953, and January and February, 1954, the complainant sent to the defendants, in keeping with the practice which had been in existence for many years, debits of expenses and credits showing the earnings of each of the trucks in question during these months. However, no payments have been made by the complainant to any of the defendants for the use of their trucks during this period of time. It wasn't until January 6, 1954 that the complainant wrote each of the lessor-defendants a letter cancelling their respective leases as of February 23, 1954. This conduct on the part of the complainant clearly indicates that complainant recognized the truck lease agreements and had no intention of attempting to avoid them even at that late hour.

The complainant corporation charged in its Bill of Complaint that certain of the defendants as officers and directors of the complainant corporation have been guilty of many acts of misconduct and breaches of duties as fiduciaries, and prayed for an accounting to determine the extent to which the complainant corporation had been damaged as a result of such misconduct and breaches of duties and for a money decree for such amounts as the Court determined from the accounting to be appropriate, but on the hearing of this cause the complainant abandoned its prayer for an accounting and for a money decree against the defendants on all matters except the trucking operations. However, the complainant did introduce an abundance of evidence in an effort to show a course of conduct on the part of the defendants designed to exploit the

resources of the complainant corporation for their own personal use and benefit while serving as officers and directors of said corporation, and to show that said defendants did not act in good faith in the performance of their duties as officers and directors of the corporation. In this connection there was evidence introduced and made a part of the record in this cause which clearly establishes that the defendants C. R. Underwood and C. Alberta Luter were guilty on more than one occasion of misconduct which was dishonest and highly reprehensible in their dealings with the affairs of the complainant corporation, while serving as officers and directors of said corporation. The evidence shows conclusively, to a moral certainty, and beyond every reasonable doubt, that the defendant C. Alberta Luter, while employed as the personal secretary of the defendant, C. R. Underwood, and head of the Bookkeeping Department, took or diverted funds belonging to the complainant corporation in the sum of $24,775.91, which amount she refunded to the company through and by virtue of the assistance of the defendant, C. R. Underwood, when such shortage was discovered. The evidence further strongly indicates that the said C. Alberta Luter took or diverted to the use of others many thousands of dollars additional of complainant's money which has not been repaid.

The evidence further shows that two of the defendant C. R. Underwood's personal notes to the Deposit Guaranty Bank and Trust Company, with interest thereon, were paid out of funds of the complainant corporation; that a subsidy of $300.00 per month for many months was paid to the Flowood Grill out of funds of the complainant corporation at the direction of C. R. Underwood without justification or any consideration whatsoever; that, at the direction of the defendant, C. R. Underwood, the defendant C. Alberta Luter, was paid her salary for several months and

a bonus of $7,000.00 at the end of the year, after she had been removed of her duties with complainant corporation following the discovery of the above described shortage; that these two defendants were guilty of other acts of misconduct and breach of duty to the complainant corporation. The evidence fails to show, however, that any of the other defendants had any knowledge of or participated in any way in these acts of misconduct and breach of duty by these two defendants to the complainant corporation. It is the considered opinion of this Court that these acts of misconduct, established by the evidence as heretofore outlined, on the part of the defendants C. R. Underwood and C. Alberta Luter constituted acts which had no connection or any bearing whatsoever on the truck leases in question. The complainant corporation has or had full, complete and adequate remedies against these two defendants for any acts of misconduct and breaches of duty of which they were guilty.

From these findings the Court concludes that none of the defendants were under a duty at any time, under the circumstances established by the evidence, to have purchased the trucks in question for the corporation, since the trucking operation was not a corporate opportunity in which the complainant corporation had either a vested or an expected interest under the provisions of its charter and the purposes for which it was organized;

That the defendants, as officers or directors or members of the family or close personal friends of such officers and directors, in leasing the trucks to the complainant corporation were not brought into direct competition with the business of complainant;

That the operation of the trucks in question as a source of income to the complainant was not essential to its business of glass container manufacturing, the purpose for which it was established;

That the profits from the trucking operations did not constitute unjust enrichment of the defendants as against the remaining stockholders, since the evidence is insufficient to show that defendants were guilty of fraudulent acts in connection with the trucking operations, and although substantial profits were made by the defendants, the complainant corporation and ultimately the stockholders of the parent corporation were greatly benefited by the trucking operations;

That the stockholders of complainant corporation had knowledge of the truck leases throughout the period of time complained of; that complainant continued to operate the trucks under the leases in question after the defendants C. R. Underwood, E. F. Underwood and J. H. Underwood were discharged as officers and directors of said complainant corporation, and that by such use and by failing to make complaint in due course it has in effect affirmed, acquiesced in and ratified said leases.

Therefore, it is the opinion of this Court that the complainant, Knox Glass Bottle Company of Mississippi, is not entitled to recover from the defendants the profits realized from the leasing of the trucks in question as prayed for in its Original Bill of Complaint, and that said Bill of Complaint should be finally dismissed with prejudice.

On the matter of the various cross bills which were filed by the defendants and cross complainants, the Court makes the following findings and conclusions, to-wit:

At the commencement of the hearing of this cause on its merits, on motion duly made in open Court by the defendant and cross complainant, C. R. Underwood, his cross bill wherein he sought to recover from the complainant and cross defendant, Knox Glass Bottle Company of Mississippi, the sum of $11,456.77 for alleged salary and bonus due him,

and the additional sum of $6,956.77 for truck rentals allegedly due him, was dismissed without prejudice.

At the commencement of the hearing of this cause on its merits, on motion duly made in open Court, the cross bill of the defendant and cross complainant, E. F. Underwood, wherein he sought to recover from the complainant and cross defendant the sum of $3,333.33 allegedly due him for salary and bonus, was dismissed without prejudice.

The Court, having heretofore concluded that the truck leases were valid, and there being no dispute on the matter of the use of the trucks of the defendant and cross complainant, Mrs. Florence P. Underwood, by the complainant and cross defendant during the months of November and December, 1953, and January and February, 1954, during which period there was earned under the provisions of the lease agreement the aggregate principal sum of $3,239.73, which has not been paid, the Court concludes that the defendant and cross complainant, Mrs. Florence P. Underwood, is entitled to a decree against the complainant and cross defendant, Knox Glass Bottle Company of Mississippi, in the amount of $3,239.73, with legal interest from the date of the decree.

The Court having heretofore concluded that the truck leases were valid, and there being no dispute on the matter of the use of the trucks of the defendant and cross complainant, E. F. Underwood, Trustee for Mary Ann Underwood and E. F. Underwood, Jr., by the complainant and cross defendant during the months of November and December, 1953, and January and February, 1954, during which period there was earned under the provisions of the lease agreement the aggregate principal sum of $3,723.25, which has not been paid, the Court concludes that the defendant and cross complainant, E. F. Underwood, Trustee for Mary Ann Underwood and E. F. Underwood, Jr., is

entitled to a decree against the complainant and cross defendant, Knox Glass Bottle Company of Mississippi, in the amount of $3,723.25, with legal interest from the date of the decree.

The Court having heretofore concluded that the truck leases were valid, and there being no dispute on the matter of the use of the trucks of the defendant and cross complainant, J. H. Underwood, Trustee for Sandra Ann Underwood, by the complainant and cross defendant during the months of November and December, 1953, and January and February, 1954, during which period there was earned under the provisions of the lease agreement the aggregate principal sum of $2,158.34, which has not been paid, the Court concludes that the defendant and cross complainant, J. H. Underwood, Trustee for Sandra Ann Underwood, is entitled to a decree against the complainant and cross defendant, Knox Glass Bottle Company of Mississippi, in the amount of $2,158.34, with legal interest from the date of the decree.

The Court having heretofore concluded that the truck leases were valid, and there being no dispute on the matter of the use of the trucks of the defendant and cross complainant, J. H. Underwood, by the complainant and cross defendant during the months of November and December, 1953, and January and February, 1954, during which period there was earned under the provisions of the lease agreement the aggregate principal sum of $6,859.66, which has not been paid, the Court concludes that the defendant and cross complainant, J. H. Underwood, is entitled to a decree against the complainant and cross defendant, Knox Glass Bottle Company of Mississippi, in the amount of $6,859.65, with legal interest from the date of the decree.

On the matter of the additional bonus claimed to be due

by the defendant and cross complainant, J. H. Underwood, it is the opinion of this Court that the acceptance by the defendant and cross complainant, J. H. Underwood, of complainant and cross defendant's check in the amount of $1,994.94, dated February 2, 1954, with the knowledge that it was being tendered in full and final setlement of all claims which he had at that time against the complainant and cross defendant for salaries and bonuses, constituted an accord and satisfaction and he is not entitled to recover anything further as bonus or salary.

The Court having heretofore concluded that the truck leases were valid, and there being no dispute on the matter of the use of the trucks of the defendants and cross complainants, E. F. Underwood and W. E. Hester, Jr., partners, doing business as Hutco, by the complainant and cross defendant during the months of November and December, 1953, and January and February, 1954, during which period there was earned under the provisions of the lease agreement the aggregate principal sum of $12,644.37, which has not been paid, the Court concludes that the defendants and cross complainants, E. F. Underwood and W. E. Hester, Jr., partners, doing business as Hutco, are entitled to a decree against the complainant and cross defendant, Knox Glass Bottle Company of Mississippi, in the amount of $12,644.37, with legal interest from the date of the decree.

The Court having heretofore concluded that the truck leases were valid, and there being no dispute on the matter of the use of the trucks of the defendant and cross complainant, C. Alberta Luter, by the complainant and cross defendant during the months of November and December, 1953, and January and February, 1954, during which period there was earned under the provisions of the lease agreement the aggregate principal sum of $9,935.01, which has not been paid, the Court concludes that the defendant and cross

complainant, C. Alberta Luter, is entitled to a decree against the complainant and cross defendant, Knox Glass Bottle Company of Mississippi, in the amount of $9,935.01, with legal interest from the date of the decree.

All court costs accrued in this cause are hereby assessed against the complainant and cross defendant, Knox Glass Bottle Company of Mississippi.

APPENDIX "B"

KNOX GLASS BOTTLE COMPANY, A MISSISSIPPI CORPORATION

v.

C. R. UNDERWOOD, ET AL.

ETHRIDGE, Justice:

This is a suit in equity by a corporation against four of its former officers and directors, and against the wife and three grandchildren (and their trustees) of an officer and director, and against a partner of an officer and director, to recover large personal profits which the defendants made from leases of trucks to complainant corporation, while certain defendants were its directors and officers. It originated in the Chancery Court of the First Judical District of Hinds County. Although the lengthy record of sixteen volumes and the briefs involve a multitude of facts and points, the pertinent controlling principles of law are well established. The chancery court rendered a decree for defendants, appellees here.

We hold that the defendants (as indivduals and two as trustees), except Hester and the three minor defendants, are liable severally for the net profits received by them after the death of Roy R. Underwood, the former president of both complainant corporation and its parent company, and that the three defendants who were directors and officers during this period of time are jointly and severally liable for the profits received by all defendants, except Hester, in the manner and to the extent hereafter set forth.

I

The complainant is Knox Glass Bottle Company, hereinafter referred to as Knox of Mississippi. It is a Mis-

sissippi corporation engaged in the manufacture and sale of glass bottles. It operates two manufacturing plants in Rankin County, Mississippi, near the City of Jackson, one plant in Palestine, Texas, and one plant in Gas City, Indiana. All of its capital stock, except five qualifying shares for its five directors, is owned by Knox Glass Bottle Company, a Pennsylvania corporation, hereinafter referred to as Knox of Pennsylvania, having its principal place of business at Knox, Pennsylvania. All of the capital stock of Knox of Pennsylvania is owned by approximately 160 to 220 individual shareholders.

Roy R. Underwood was a director and president of Knox of Mississippi from 1933, the date of its organization, until his death in an automobile accident on October 16, 1951. In 1934 Roy R. Underwood became president of Knox of Pennsylvania, and served also in that capacity until his death in October 1951. Roy R. Underwood owned slightly less than one-third of the outstanding shares of stock in Knox of Pennsylvania. He was a strong executive, experienced in the glass business, and the Board of Directors of Knox of Pennsylvania placed upon him the primary responsibility for supervising and directing the several plants in the northern states owned by Knox of Pennsylvania, and the four glass manufacturing plants owned and operated by its subsidiary, Knox of Mississippi. On March 26, 1934, the Board of Directors of Knox of Pennsylvania gave Roy R. Underwood, its president, a general proxy to "represent this company and vote stock owned by this company at any shareholders" meeting called by any company in which the Knox Glass Bottle Company of Pennsylvania owned stock, and such power of attorney to continue in full force and effect until rescinded by the Board of Directors of this company." This general proxy to vote stock of Knox of Pennsylvania was reaffirmed by its

Board of Directors in 1942 and in 1947. After C. R. Underwood became president of both companies in October 1951, the Board of Directors of Knox of Pennsylvania gave him a similar power of attorney to vote the stock owned by that company.

During the period of time involved in this litigation, the defendant C. R. Underwood, a brother of Roy R. Underwood, was an officer and director of the complainant, Knox of Mississippi. Prior to the death of Roy in October 1951, C. R. Underwood was vice-president and general or plant manager of Knox of Mississippi. He was in active management and control of complainant, subject to the orders of Roy. After the death of his brother, Roy, C. R. Underwood became a director in, and the president and general manager of, both Knox of Pennsylvania and Knox of Mississippi. He resigned as president of both companies on November 26, 1953. He was removed as general manager and as a director of both companies after a proxy battle with another group of stockholders in Knox of Pennsylvania, on December 1, 1953.

The defendant E. F. Underwood is a son of C. R. Underwood. He was a director in and vice-president of complainant corporation from April 17, 1939, until his resignation in November 1953. He also served during parts of this period as treasurer, assistant secretary, and assistant general manager. E. F. Underwood was a director of Knox of Pennsylvania for a portion of the time involved in this litigation, from March to November 1953.

Another defendant and son of C. R. Underwood is J. H. Underwood, who was a vice-president of complainant corporation from March 1, 1952 until November 1953, and a director from May 1952 until November 1953. J. H. Underwood was also a trustee under a certain instrument of trust created by C. R. Underwood for the benefit of

defendant Sandra Ann Underwood, the minor daughter of J. H. Underwood. E. F. Underwood was also the trustee of a trust created by C. R. Underwood for his other grandchildren, Mary Ann Underwood and E. F. Underwood, Jr., defendants, the minor daughter and son respectively of E. F. Underwood.

The defendant Mrs. Florence P. Underwood is the wife of C. R. Underwood. Defendant C. Alberta Luter is and was the confidential, personal secretary and close personal friend of the defendant C. R. Underwood. She was a director and secretary and assistant treasurer of Knox of Mississippi from July 26, 1941, until January 23, 1951. From April 4, 1934 until July 26, 1941, she was assistant secretary and assistant treasurer of complainant. The defendant W. E. Hester, Jr. was a partner of defendant E. F. Underwood, doing business under the partnership name of Hutco, which partnership, along with the other defendants, owned and leased certain motor vehicles to Knox of Mississippi. Hester was also an officer and director of Motors, Inc., a Mississippi corporation, which operates a distributorship of trucks, tractors and trailers near the City of Jackson. Motors, Inc. has been controlled by the Underwood family for a number of years. Its plant is located on property purchased from the Flowood Corporation, of which C. R. Underwood is president and C. Alberta Luter is an officer.

In brief, there are eleven defendants, as individuals and in a representative capacity. Four of them, C. R. Underwood, his sons, E. F. and J. H. Underwood, and C. Alberta Luter are former officers and directors of complainant corporation. Defendant Hester is a partner of one of the officers and directors, E. F. Underwood, and Florence P. Underwood is the wife of one of them. The other three defendants are grandchildren of C. R. Underwood, who

created trusts for them into which were directed proceeds of some of the truck rentals paid by the corporation. The fathers of these minors, E. F. and J. H. Underwood, were made defendants as trustees and natural guardians of them.

The gist of this action is that during the time the Underwood family was in control of Knox of Mississippi, they and their close personal friends and associates, and members of their family, leased to the complainant corporation large trucks which were used to haul glass bottles and other related products, and other commodities on some of the back-hauls; that these officers and directors, the members of their family, and their friends, and business associates, while such officers and directors occupied a fiduciary relation to the appellant, made large personal profits by leasing trucks to the corporation, in contracts wherein the said defendants represented both the corporation on one side and themselves on the other. The bill of complaint charged that such profits represented an unjust enrichment obtained by defendants in violation of their fiduciary duties to the corporation, asked for an accounting for such profits, and for a decree directing their repayment to complainant.

The principal defenses raised in the pleadings and the evidence are: (1) All of the facts in regard to the truck leases and their operations were reported to Roy R. Underwood, who was the President of Knox of Pennsylvania and Knox of Mississippi until his death in October 1951, and Roy, representing the Pennsylvania corporation, which owned all of complainant's stock, had established a definite policy that the company should not make capital investments by buying trucks but should lease them, and C. R. Underwood and the other defendants who were officers and directors were acting pursuant to this direction by the executive and policy-making head of both companies; (2)

Knox of Pennsylvania, through Roy, its directors and stockholders, had full knowledge of all the facts concerning the truck-leasing contracts, by regular, periodic "clipper reports" of trucking operations made by Knox of Mississippi to the President of Knox of Pennsylvania, and the directors and stockholders of Knox of Pennsylvania, acting through their President Roy R. Underwood, authorized such leases, and ratified and approved them; (3) After Roy's death in October 1951, when C. R. Underwood became president and a director of both companies, serving in those capacities through November 1953, the Pennsylvania company was in bad financial condition and used all of complainant's available capital to finance investments in the northern plants of the parent company; therefore, complainant corporation was never able to make capital investments in trucks, and the decision of the defendants who were directors of complainant not to buy but lease trucks was a matter of business judgment; (4) the truck leases and rentals were fair and equitable, resulted in benefits to complainant corporation, and cost it less than transportation by common carriers; and (5) the defendants acted honestly and in good faith in entering into these lease agreements and in all of their dealings with and on behalf of the corporation.

Knox of Mississippi is governed by a board of five directors. From 1941 until April 1948, it consisted of Roy R. Underwood, who lived in Knox, Pennsylvania; C. R. Underwood, the younger brother of Roy Underwood, and the vice-president and general manager; C. R.'s son, E. F. Underwood; Miss C. Alberta Luter, and L. D. Richardson, a resident of Pennsylvania. The board members who resided in the Jackson area were C. R. and E. F. Underwood, and Miss Luter. Except that J. T. Helsel, a resident of Pennsylvania, was substituted for Richardson, the board con-

tinued with this set-up until January 3, 1951, at which time Miss Luter was dropped from the board and Malcolm Lowe was elected in her place. Helsel, Lowe and Luter were salaried employees. Since Roy R. Underwood lived in Knox, Pennsylvania, he came to Mississippi only infrequently. C. R. Underwood, Vice-president and General Manager of Knox of Mississippi, lived in Jackson, and was the officer in active control and direction of Knox of Mississippi. Immediately under C. R. Underwood was the defendant E. F. Underwood, who was vice-president, assistant general manager, and a member of the board of directors of Knox of Mississippi. In other words, as E. F. Underwood testified, during this period he and his father "were the main spokes in the wheel" of Knox of Mississippi.

After Roy R. Underwood died in October 1951, and C. R. Underwood moved to Knox, Pennsylvania to serve as President of both Knox of Pennsylvania and Knox of Mississippi, G. B. Underwood, a nephew of C. R. Underwood, was elected to complainant's board of directors in Roy's place. This continued until May 5, 1952 when J. H. Underwood, a defendant and another son of C. R. Underwood, replaced Helsel, and thereafter until December 1953 the board of directors of the Mississippi corporation consisted of C. R. Underwood, his two sons, E. F. and J. H. Underwood, his nephew, G. B. Underwood, a nonresident of Mississippi and upon whom no process was obtained in this suit, and Malcolm Lowe, an accountant who was a salaried employee of Knox of Mississippi.

C. R. Underwood and his nephew, G. B. Underwood, became members of the board of directors of Knox of Pennsylvania on October 18, 1951, after Roy's death. Defendant E. F. Underwood was elected vice-president and a member of the board of directors of Knox of Pennsylvania on

March 3, 1953, and on the same date, G. B. Underwood became executive vice-president. On March 4, 1952, C. R. Underwood's nephew, F. C. Hicks, upon whom no service of process was obtained in this case, since he was a non-resident of Mississippi, became vice-president. On March 3, 1953, Hicks was elected secretary of Knox of Pennsylvania. In the November 1953 proxy battle with the Victor T. Norton group, all of the Underwoods were ousted from the board of directors of Knox of Pennsylvania as well as Knox of Mississippi, except E. F. Underwood was retained as a member, but he resigned on April 24, 1954.

In brief, although Roy R. Underwood was the top policy-making executive of the Knox group, it is apparent that the detailed day-to-day operations of Knox of Mississippi were delegated to his brother, C. R. Underwood, E. F. Underwood, and Miss Luter, who served as officers of Knox of Mississippi. Roy received regular reports of these operations, but the defendants who were officers and directors of the corporation (especially C. R. and his son E. F. Underwood) were the "main spokes in the wheel" in the operation of Knox of Mississippi. Certainly the complainant corporation was run by the Underwood family and their close personal friends and associates. For example, from July 26, 1941, to January 23, 1951, there were sixty-one meetings of the board of directors, and the only persons present at fifty of these were C. R. and E. F. Underwood and Luter. They also attended the remaining meetings held during this period. The only meetings attended by Roy were the annual stockholders' meeting and the organizational meeting of the board of directors held immediately following it.

Knox of Mississippi sold the glass containers manufactured by it mostly in the southern part of the nation. In 1944 and 1945 the corporation purchased four tractor

and trailer units (which for brevity will hereafter be referred to as "trucks") in order to deliver manufactured products to customers, and to bring back to the plant raw materials such as sand and cullet, or broken or scrap glass. These and the other trucks owned and leased by the corporation were given numbers, such as truck No. 1, 2, 3, and up to No. 30. In 1946, J. G. C. H. Smith, sales representatives of the corporation, at the request of C. R. Underwood, leased truck No. 5 to it. They were not officers or directors. In that year truck No. 5 lost about $2,000, but by the end of 1947 it was making an annual profit of $6,000 or more. Subsequent to 1947 truck No. 5 netted profits of $10,000 a year and more. When C. H. Smith became an officer and director of Knox on December 1, 1953, he sold the unit to Knox. Up until the middle of 1948, Knox of Mississippi was operating nine truck units, seven of which were company-owned and two of which were leased. By that time it was obvious that large profits were being made by the trucks. For 1947, the four company-owned trucks earned a net profit without dead-head of $23,210.06. On September 8, 1948, the first truck of which complaint is made in this suit, No. 10, was leased to complainant by defendant J. H. Underwood. From December 1947 to July 1953, twenty tractor and trailer units were leased to the corporation as follows: Meridale, Inc., 1 unit; J. H. Underwood, 1 unit; Hutco, 3 units; Florence P. Underwood, 2 units; C. Alberta Luter, 4 units; C. R. Underwood, 6 units; J. W. Smith, and H. B. DeVinney, 1 unit; and G. B. Underwood, 2 units.

Under these lease agreements, the lessee-corporation paid to the lessors as rental for the motor vehicle and equipment a sum equal to the published carload freight rate on all tonnage for which the vehicle and equipment was used to transport, after first deducting from that

amount drivers' wages, insurance premiums, gasoline and oil, repairs and maintenance, tires, and other deductions in connection with the use and operation of the vehicle, when approved by lessor. The lease was on a month-to-month basis, with a right in either party to terminate on thirty days written notice. In other words, Knox of Mississippi credited the lessors with the amounts of rentals earned, paid the operating expenses, outlined in the lease, and charged them to the lessors' account. The balance was paid to the lessors each month by check of the corporation. Hence payments by Knox represented net profits to lessors, after payment of all operating expenses, except depreciation and personal property taxes.

Several witnesses testified without dispute that Roy R. Underwood made all major decisions concerning the operations of the Knox plants. The evidence amply supports the chancellor's finding that the board of directors of Knox of Pennsylvania, which owned all of the stock in Knox of Mississippi, did not question Roy R. Underwood's judgment in the operation of the Knox businesses. Roy R. Underwood decided as a matter of policy that the company should not purchase and own any trucks. He was opposed to it operating its own trucks, for the purpose of hauling its wares to its customers and making return hauls of property of others. He considered that it was preferable for the company to use its available funds in its glass manufacturing operations. After C. R. Underwood purchased clippers Nos. 7, 8 and 9 (a name applied to the tractor and trailer units), Roy, in March 1949, rebuked C. R. Underwood for violation of his instructions and policy with reference to capital investments, and instructed him to dispose of the clippers owned by the company. However, the company retained the clippers which it had purchased.

By the end of 1948, Knox of Mississippi had in operation eleven trucks, eight of which were company-owned and three of which were leased from others. From 1948 up until 1953, during the period the Underwoods, who were officers and directors, were in control of the Mississippi corporation, Knox of Mississippi placed in operation nineteen additional units. Of these, seventeen were put on by C. R. Underwood, members of the Underwood family, and Miss Luter. Other persons, not members or friends of the Underwood family and not directors and officers of complainant, sought on several occasions to lease additional trucks to complainant, but were denied the opportunity. A summary of the number of truck leases made during the period in question is given subsequently.

The overwhelming weight of the evidence shows that the Underwoods and their close personal friends and business associates fully availed themselves of the profitable opportunity of leasing trucks to the corporation. J. H. Underwood in 1948 leased one truck. In 1949, Hutco leased two trucks. In 1949, Florence P. Underwood, the wife of C. R. Underwood, leased one truck.

In 1949, Miss Luter leased two trucks, and in 1950, two others. The 1950 leases were made by Miss Luter to the corporation after a shortage in Miss Luter's accounts of $24,775.91 was dicovered in October 1949 by accountants. After this shortage was revealed, C. R. Underwood borrowed personally $25,000, and paid the amount of the shortage to Knox of Mississippi. In January and February 1950, he arranged for Luter to lease two more trucking units to Knox of Mississippi. From these two trucks alone in 1950, Luter received in excess of $27,000 from the corporation as net rental payments. She then paid C. R. Underwood the amount which he had borrowed to make up her shortage, and Underwood repaid the personal loan which he had obtained.

In 1950, C. R. Underwood leased two trucks to the corporation, and his wife one. In 1951, he leased two other trucks to the corporation, and in 1953, after Roy's death and while he was serving as president of both Knox of Mississippi and Knox of Pennsylvania, C. R. Underwood leased two other trucks to Knox of Mississippi. In 1953, G. B. Underwood leased two trucks to the corporation.

In January 1952, after Roy's death, C. R. Underwood transferred his trucks Nos. 24 and 25 to E. F. Underwood as trustee for E. F. Underwood's two children, C. R.'s grandchildren, and also transferred truck No. 22 to his son, J. H. Underwood, as trustee for his minor child, C. R.'s grandchild. The purpose of these transfers to the trustees of C. R. Underwood's grandchildren was to build up an estate for them out of the profits and earnings from the trucks. The trustees had no funds in the trust estates. They paid for the trucks out of the net rentals paid by Knox of Mississippi to the trustees. When he made these transfers, it is clear that C. R. Underwood knew that the trustees would be able to pay him for these three trucks out of the rentals that they would receive in about seven months' time. And, of course, during this period, C. R. was president of both complainant and Knox of Pennsylvania. Roy was dead. Moreover, when the leases were made to complainant by Luter, Hutco, Mrs. Florence P. Underwood and other members of the Underwood family in 1949 through 1953, C. R. Underwood and the lessors, who were officers and directors, or their associates, knew that the net rentals from the trucks would pay off their purchase prices within five to ten months, and that thereafter the rentals, except for depreciation and personal property taxes, would be clear profit.

With the exception of three leases which were signed for the corporation by Malcolm Lowe, all of the truck leases to Knox of Mississippi were signed for the cor-

poration by one of three defendants who were directors and officers, C. R., E. F. and J. H. Underwood. In instances where one of these directors and officers would make a lease to complainant, one of the others would sign the lease on behalf of the corporation.

Over the period of time in question, from 1948 through October 31, 1953, defendants, and C. R. Underwood's nephews, G. B. Underwood and F. C. Hicks, were paid $1,054,519.41 as net revenues after deduction of operating expenses by Knox. After the further deduction of estimated depreciation at a rate of 25 percent per year, the defendants and the two nephews over this period of time earned a net profit of $890,305.43, allocated as follows:

C. R. Underwood	$139,515.91
G. B. Underwood	8,892.08
E. F. Underwood, Trustee	46,158.29
J. H. Underwood	95,700.89
J. H. Underwood, Trustee	24,155.33
Florence P. Underwood	103,854.41
F. C. Hicks	18,863.63
C. Alberta Luter	191,101.52
Hutco	262,063.37
Total	$890,305.43

Defendants contend that a proper rate of depreciation is 33⅓ per cent per year, over a three-year period, rather than 25 percent over a four-year period. Assuming this contention is correct, and we do not decide this question now, then the amount of net profits received by defendants would be reduced somewhat from the figures set forth herein.

Roy R. Underwood died in October 1951. C. R. Underwood then became president of both Knox of Pennsylvania

and Knox of Mississippi, and was the principal executive officer of these corporations. From January 1, 1952, until October 31, 1953, defendants received net truck rentals of $499,116.51. After deduction of operating expenses and estimated depreciation at the rate of 25 percent per year, defendants and the two nephews received a net profit subsequent to January 1, 1952, of $415,413.93, allocated as follows:

C. R. Underwood	$29,716.53
G. B. Underwood	8,892.08
E. F. Underwood, Trustee	46,557.99
J. H. Underwood	48,152.72
J. H. Underwood, Trustee	24,885.76
Florence P. Underwood	47,870.94
F. C. Hicks	18,863.63
C. Alberta Luter	82,171.03
Hutco	108,303.25
Total	$415,413.93

The following procedure was adopted under the leases in regard to all of the leased trucks: Employees of Knox of Mississippi supervised the operation, the routing and the repairing of leased trucks, and hired the drivers, except as to the soda-ash truck, No. 12. The corporation provided all storage and terminal facilities, handled all problems and costs of traffic and safety, except cost of liability insurance, planned all the truck movements, and arranged for all back-hauls, hereafter discussed, and directed and supervised all of the operating and maintenance personnel. The corporation did all of the bookkeeping necessary in order to keep detailed records on each truck's movements, the revenues of the trucks, and the classes and amounts of expenses.

A. H. Morgan, a certified public accountant, with experience in regard to truck operations, was a witness for complainant. He testified that there were several reasons why the truck operations were so profitable. The regularity of the need for transportation in a stabilized quantity permitted the management to determine the most economical number of units needed, assuring continuous and regular usage. The situation of the sources of needed raw materials and the location of customer outlets for finished products enabled efficient utilization of truck movements. The finished products manufactured by complainant were readily adaptable to movement by truck. Moreover, as detailed above, Knox of Mississippi, as lessee, furnished most of the services and facilities which other carriers had to furnish out of their own management and funds, and in effect, supplied the same at no cost to the trucking operation. In addition to storage and terminal facilities, traffic and other problems, planning all truck movements and arranging for backhauls, the corporation negotiated for and arranged schedules for outside miscellaneous backhauls of such commodities as fruits and vegetables, all of the revenue from which was turned over to the truck owners. Complainants' employees also supervised all operating and maintenance personnel, and did the necessary bookkeeping. Hence Morgan said that the set-up was a "natural" for a company-owned trucking operation. It should be noted that everything connected with the operation other than the bare ownership of the trucks was the property and responsibility of Knox of Mississippi. The lease agreements had no provision for the back-hauling of agricultural and other products for third persons for hire. However, this course of income was utilized by complainant for the benefit of the lessors. Profits on backhauls were credited by complainant, under the manage-

ment of the defendant officers and directors, to the accounts of the owners and lessors of the equipment. However, a substantial part of the profits from the backhauls were obtained from the transportation of complainant's own property, such as interplant ware transferred from one plant to another, and cullet and cartons bought by complainant.

The leased trucks which were originally bought by the lessors and leased to the corporation were purchased with small down payments, and the balance of the purchase price, as well as the down payments, were paid off in full from net rental profits from the trucks in periods ranging from five to ten months. Most of the trucks, such as the three transferred to trustees for C. R. Underwood's grandchildren, were paid for in toto out of the net rentals on the trucks within five to ten months.

Appellees contend and the chancellor found, erroneously we think, that the leases were in fact beneficial to the corporation; and that by getting a rate schedule on carload freight rates, the lessee complainant saved a large amount of money over the period of time in question. For the first nine months in 1953, for the Jackson plant, 40.23 per cent of the complainant's merchandise was shipped by leased clipper trucks. Customers came and got 41.29 percent of the company's output; 7.42 percent was shipped by company-owned clippers; 6.76 percent was shipped by rail; and 4.30 percent was shipped by motor freight during the period in question.

Throughout the history of the company, the ratio between its gross sales and its freight charges has remained substantially constant. The freight charges have amounted to about 12.29 percent of the complainant's gross sales. However, A. N. Morgan, certified public accountant, made a study of the truck operations at Knox of Mississippi,

and compared their operating revenues and costs with public contract carriers operating in the southern region. The result of this study reflected that the net profit on gross revenues earned by company-owned and by leased trucks was approximately 33.03 per cent of such revenue. In other words, of every dollar received by Knox of Mississippi's own trucks and by leased trucks, 33.03 percent was profit. On the other hand, contract carriers operating in the southern region earned a profit of 6.23 percent of the amount of revenue received. Morgan testified that the latter figure was arrived at by public contract carriers dealing at arm's length with business men representing an industry which had a product to transport. Such public contract carriers had arrived at tariffs which permitted them to make a return on the gross volume of revenue of from 5 to 7 percent. There were no arm's length negotiations at Knox of Mississippi with respect to the leased trucks. It is undisputed that the defendants, who were officers of the corporation, made no attempt to obtain more favorable trucking contracts for the corporation. Hence, on the leased trucks operating for complainant, a net return was earned of about 33.03 percent per annum on gross revenues. The leased trucks produced a far greater profit than was being made by public contract carriers in this southern region. It is undisputed that complainant did not receive a single benefit from operating the trucks as lessee that it would not have received in operating them as the owner. So if Knox of Mississippi had owned the trucks and retained the rentals or net profits which it paid to the defendants, it would have received all benefits which it actually received from the trucking, would have owned the trucks fully paid for, and would have had several hundred thousand dollars more cash for itself.

C. R. Underwood testified that "it was obvious from the detailed reports that this company sent to the Knox office

that the company should have put on trucks." However, he, E. F. Underwood and Miss Luter, and one or two other witnesses testified without dispute that Roy R. Underwood during his lifetime forbade Knox of Mississippi to operate company-owned trucks. And Roy was the undisputed executive head of both Knox of Pennsylvania and of Mississippi. After Roy R. Underwood died and C. R. Underwood became president of both the parent and subsidary, C. R. Underwood asserts that he did not then change Roy's policy forbidding company-owned trucks because he discovered that Knox of Pennsylvania was in very poor financial condition, and was draining from the Mississippi corporation its available surplus. Knox of Pennsylvania had a large tax liability, and was operating with an overdraft of $1,555,070.80 in five different banks. In the fall of 1951, it had to borrow $3,000,000 from the Commercial Credit Company, secured by a mortgage on its assets, which provided that expenditures for capital investment in excess of its current depreciation should not be made "except with the prior written consent of the lender." However, after C. R. Underwood became president of both companies, he had the Pennsylvania corporation purchase trucks for some of its northern operations. Moreover, the chancellor correctly found that Knox of Mississippi was at all times able to buy trucks. After the new management took over, the lender agreed for Knox to purchase trucks. C. R. Underwood did not request, while he was president of the Knox companies, permission to do this. Nor did he, or E. F. or J. H. Underwood make any effort whatever to negotiate truck leases or contracts more favorable to complainant.

The evidence further reflects that Roy R. Underwood, during his lifetime and while he was president of both corporations, had full knowledge of these trucking leases. On the other hand, it does not appear that the other directors of Knox of Pennsylvania, which owned all of the stock

in complainant, or its stockholders had full or any substantial knowledge of the details of the trucking operations by complainant or the extent of profits being realized by the defendants.

The available profits and the fact that the company could have saved considerable money by either shipping by public contract carriers on a competitive basis or by owning its own trucks, is not a matter of hindsight. The record clearly shows that after the middle of 1948, C. R. Underwood and the other officers and directors of complainant had full knowledge of the large and disproportionate profits being realized by the leased trucks.

On May 15, 1953, in response to an inquiry from C. R. Underwood Hon. P. H. Eager, Attorney for Knox of Mississippi, wrote a letter to C. R. Underwood, in which he advised that undoubtedly the lease agreements should be approved by the directors of both the Mississippi corporation and the parent corporation; and that those who were interested in the truck leases and who had benefitted financially in "highly substantial amounts are the top executive management and officers of the subsidiary Mississippi corporation." Eager in the letter, pointed out that these relationships are of a fiduciary nature, and since the officers are acting on the one hand for the stockholders and on the other hand to their individual profit and gain, the corporation should be advised of the facts and have the opportunity to decide through its stockholders whether to own trucks or to continue to lease them. It was urged that this should be promptly submitted at an early meeting of the directors of the parent company. After Eager's letter of May 15, 1953, C. R. Underwood, as well as E. F. and J. H. Underwood not only continued to lease the trucks for himself, his family, and friends, but he arranged for his nephew, G. B. Underwood, to put on two additional trucks. Prior and subsequent to this date, the units were earning large

profits, in excess of 100 percent of their cost per annum, and in the case of the soda-ash truck, more than 783 percent over a period of less than five years. Yet the defendants, who were managing officers and directors of complainant corporation, made no effort to obtain a better deal for the company with the lessors, or to negotiate more favorable leases, or to obtain competitive bids from public contract carriers.

In March of 1953, Victor T. Norton became a member of the board of Knox of Pennsylvania. He and other stockholder interests, not connected with the Underwood group, obtained proxies from about 78 percent of the stockholders, elected a new slate of directors, and ousted all of the Underwood group. Anticipating the result of the stockholders' meeting, C. R. Underwood resigned as president of the two corporations on November 26, 1953. The parent corporation operated a number of glass plants, both north and south. A reasonable time was required for the new administration to re-examine the financial and administrative condition of the parent company and its subsidiaries, and to adopt such changes in policy as the new board of directors thought proper A month and six days after the change of administration, after complainant's new board of directors had consulted legal counsel, complainant wrote letters to the defendants repudiating the truck lease agreements, and advising that complainant did not recognize them as valid. The letter reserved the right to demand reimbursement for rentals paid the defendants, advised that the "purported" lease agreements should be terminated as of that date, and tendered immediate possession of the equipment. On February 23, 1954, complainant purchased some of the trucking equipment from the lessors. The documents, including the bills of sale signed by defendants, recited that it was agreed that the purchases were without any prejudice to complainant's rights to maintain

litigation of the present type, and that complainant reserved all rights to repudiate the leases and recover the rentals paid under them.

The opinion of the learned chancery court may be summarized as follows: The defendants, C. R., J. H. and E. F. Underwood, and Miss Luter occupied a fiduciary relation with the corporation during the periods they were officers and directors. However, the burden of proof is on complainant to show that defendants used their positions with the corporation to overreach it and its stockholders, and that through acts of bad faith they became unjustly enriched. Complainant must produce clear and convicing evidence of bad faith on the part of Roy and C. R. Underwood, and the other officers and directors, in deciding that the company should lease the trucks; and complainant had the burden of proving that the defendants were guilty of fraudulent acts in connection with the trucking operations. Complainant actually benefited by many thousands of dollars from the operation of leased trucks at carload freight rates; the volume of business was increased thereby; and the leases were fair and reasonable. However, the trial court found as a fact that, although Knox of Pennsylvania was hard pressed for operating capital, complainant made substantial profits during the period in question, and at all times was financially able to have purchased the trucks for itself. Knox of Pennsylvania actually purchased a number of units after C. R. Underwood became its president. The trucking operation was not such a business opportunity of complainant as to "absolutely require" defendants to act upon and seize it for the corporation. It did not bring defendants in direct competition with complainant. The learned chancellor thought that whether the trucks should have been purchased or leased by the corporation was a matter of business judgment which was left by the stockholders of Knox of Pennsylvania to Roy during his life-

time, and then to C. R. Underwood. These persons decided that the trucks should be leased. And he said that there was no clear and convincing evidence of bad faith on their part in so deciding.

The chancery court stated that the "power of attorney" given Roy R. Underwood, and later C. R. Underwood, constituted them the agents of the stockholders for notice of their actions; that the stockholders of both corporations were charged with notice of the trucking operations; and that the directors and stockholders of Knox of Pennsylvania either knew or should have known about it. The Chancellor said that the personal misconduct of C. R. Underwood and Miss Luter in dealing with corporate funds was clearly established, and that they "were guilty on more than one occasion of misconduct which was dishonest and highly reprehensible in their dealings with the affairs of the complainant corporation, while serving as officers and directors of said corporation;" that the evidence does not show that any of the other defendants had knowledge of such acts of misconduct and breaches of duty by these two defendants; and that such acts have no connection with the truck leases. Because complainant used the leased trucks until February 23, 1954, complainant recognized the validity of such leases and ratified them. It was stated that on the trial of the case complainant abandoned its prayer for a general accounting and a money-decree against defendants on all matters, except the trucking operations. The chancery court held that the evidence was insufficient to show that defendants were guilty of fraudulent acts in connection with the trucks, and the final decree dismissed the bill of complaint with prejudice. On the cross bills of several of the defendants, the chancery court granted judgments to Mrs. Florence P. Underwood, E. F. Underwood, as trustee for Mary Ann Underwood and E. F. Underwood, Jr., minors, J. H. Underwood,

trustees for Sandra Ann Underwood, a minor, to J. H. Underwood individually, to C. Alberta Luter, to E. F. Underwood and W. E. Hester, Jr., partners, doing business as Hutco, for rentals on trucks leased by these parties to complainant for the months of November and December 1953, and January and February 1954, with interest from the date of the decree. These party-defendants have taken cross-appeals, and contend only that the chancery court should have allowed them interest on such rentals from their due date.

II

In dealing with this case on the merits, certain conclusions of law and established legal principles should be stated at the outset. After that, the extent to which those principles are applicable to the present facts will be considered.

The chancery court was warranted in holding that complainant abandoned its prayer for a general accounting, and is confined to its prayer for a recovery of the profits received by defendants from the trucking operations. This is supported by the basis upon which complainant was permitted to introduce evidence of acts of misconduct by C. R. Underwood and by Miss Luter, not connected with the trucks, to show a course of dealing and intent with reference to the corporate funds, and by the contentions made by complainant in its trial brief submitted to the chancery court, as quoted in a brief of appellees, and not denied by appellant. The briefs and arguments on appeal further support this conclusion of the chancellor. This does not affect whatever rights complainant might have, if any, in another suit against defendants for any claims other than profits received from the leased trucks.

The chancery court was in error in stating in its opinion that the burden of proof was upon complainant to show

by clear and convincing evidence that defendants were guilty of bad faith in making the truck leases and of fraudulent acts in connection with the trucking ventures. This is a suit to recover from fiduciaries profits made from contracts in which they represented both themselves and the corporation. Where this conflict exists, and where there is no full disclosure and ratification by or estoppel of the corporation and its stockholders, equity requires the fiduciary to account for the profits, regardless of the good faith of the defendant fiduciaries, and regardless of whether the corporation suffered any actual injury. Even if the ground for rescission was unfairness or bad faith, and in either circumstance, the burden of proof is on the director or officer to show its inherent fairness to the corporation. Pepper v. Litton, 308 U.S. 295, 60 S.Ct. 238, 84 L.Ed. 281; Gwin v. Fountain, 159 Miss. 619, 120 So. 18 (1930); 3 Fletcher, Corporations, Secs. 921, 913, 916; 19 C.J.S., Corporations, Secs. 783, 818. As hereinafter discussed, a distinction is made between a situation where a director deals both on the one hand for himself and on the other for the corporation, and one where a director represents himself and, on the other hand, the corporation is represented by other persons independent of the director or officer. Even if it is assumed that the latter situation should exist as to certain of the defendants, the burden of proof is upon the director or officer who seeks to uphold the transaction, not only to prove the good faith of the transaction, but also to show its inherent fairness from the viewpoint of the corporation.

The fact that complainant's charter does not expressly authorize trucking operations does not insulate defendants from liability for profits from the truck leases, if they are otherwise recoverable. Aside from the question of whether that function was reasonably and necessarily related to its express charter powers, this contention of

defendants "has been universally rejected." 3 Fletcher, Sec. 890.

The doctrine of corporate opportunity does not apply to this case. Appellees argue that trucking was not a corporate opportunity of Knox of Mississippi; that its business was that of making glass; and that these trucks could not have operated as they did without the revenues derived from the return haul of property of others for hire. 3 Fletcher, Cyclopedia Corporations (Perm. ed. 1947), Sec. 861.1, states; "The doctrine of 'corporate opportunity' is nothing new to the law. It is but one phase of the cardinal rule of 'undivided loyalty' on the part of fiduciaries. In other words, one who occupies a fiduciary relationship to a corporation may not acquire, in opposition to the corporation, property in which the corporation has an interest or tangible expectancy or which is essential to its existence."

In fine, the doctrine of corporate opportunity is a limited principle dealing primarily with the acquisition of a property interest which is adverse to that of the corporation, and to the acquisition of a property interest in which the corporation has an interest or expectancy. And of course there are limitations and exceptions to the rule of corporate opportunity. Usually where there is such a usurpation, the fiduciary buys property which the corporation needs or wants, and later sells it at a profit, or the officer or director for his own account and purposes engages in a venture similar to that which the corporation might engage in and makes a profit out of it.

We are here concerned with whether another and much broader rule is applicable to the facts. It is undisputed that the defendant fiduciaries and their personal friends and business associates have made large personal profits at the expense of the corporation. The directors and other officers of a corporation, while not trustees in the technical

sense in which that term is used, occupy a fiduciary relation to the corporation and to its stockholders. 3 Fletcher, Sec. 838; Ventress v. Wallace, 111 Miss. 357, 71 So. 636 (1916); Millsaps v. Chapman, 76 Miss. 942, 26 So. 369 (1899); Pepper v. Litton, supra.

The following rule is well established, as set forth in 3 Fletcher, Sec. 884:

"Since the directors and other officers of a corporation, whatever their relation may be technically, occupy a fiduciary or quasi trust relation toward the corporation and the stockholders collectively, it is thoroughly well settled that they cannot, either directly or indirectly, in their dealings on behalf of the corporation with others, or in any other transaction in which they are under a duty to guard the interests of the corporation, make any profit, or acquire any other personal benefit or advantage, not also enjoyed by the other stockholders, and, if they do so, they may be compelled to account therefor to the corporation in an appropriate action.

"In other words, as stated in one case, the accountability of a director of a corporation is determined by the strict standards of rectitude that find a fiduciary; he is not entitled to profits beyond the earnings on his stock, a proper compensation and expenses. . . . If officers or directors make a personal profit through the use of corporate assets, they must account for it to the stockholders, and it is immaterial that their dealings may not have caused a loss or been harmful to the corporation; the test of liability is whether they have unjustly gained enrichment."

The important factor in the present case is that the interested fiduciaries have acted for and represented both the corporation and themselves in making these lease contracts. Where that occurs, it is well established that, in the absence

of ratification or estoppel, and full disclosure, the transaction is voidable at the option of the corporation, without proof of actual fraud or of actual injury to the corporation. This is clearly stated in 3 Fletcher, Sec. 924:

"No principle in the law of corporations, therefore, is founded on sounder reasons, or more surely settled, than the principle that the directors, trustees or other officers of a corporation, who are intrusted with its interests, and occupy a fiduciary relation towards it, will not be allowed to contract with the corporation, directly or indirectly or, to sell property to it, or purchase property from it, where they act both for the corporation and for themselves. In such a case, the transaction is, at the least, voidable at the option of the corporation; and it may be avoided and set aside, or affirmed and any profits recovered, without proof of actual fraud, or of actual injury to the corporation. So this rule has been held applicable to a sale by directors of their stock to the company, and to a lease of a corporation's building voted by the directors to themselves as individuals, but has been held not applicable to the declaration of a dividend by a board of directors.

" 'The reason given by courts of equity for the rule that a trustee may not sell to himself the property of the cestui que trust is that the latter is entitled to the disinterested management and judgment of the trustee, in effecting a sale, and that his self-interest must not be allowed to intervene to conflict with and probably prejudice that of his constituent.' It has also been said that 'the purpose and reason of the rule is to secure fidelity in the agent, and will not permit him to assume a position where his own private interest will tempt him to overlook or disregard the interest of his principal.' Generally, this rule is applied in case of directors but it is equally applicable to other officers."

The reasons for this rule are set forth in 3 Fletcher, Sec. 926:

"It is to be noted that the main, if not the only, difference between dealings with a corporation as dependent upon whether the officer adversely interested to the corporation acts also for the corporation in the transaction, or whether the corporation acts through other officers, is that in the former case the corporation may have the contract or other transaction set aside merely because of the relationship of the parties and without regard to whether the corporation has been injured, or the contract is fair or unfair, or the officer has acted in good faith or in bad faith, while in the latter class of cases the weight of authority holds that in order to set the contract or other transaction aside there must be proof of unfairness causing actual injury or of bad faith of the officer or officers."

The same principles and distinction are set forth in 13 Am. Jur., Corporations, Sec. 1002. It is there said that where an officer or director represents both himself and the corporation, the contract is voidable by the corporation without reference to the good faith of the defendant or whether the corporation suffered an actual injury; that fidelity in the agent is what is aimed at, and "the law will not permit the agent to place himself in a situation in which he may be tempted by his own private interest to disregard that of his principal." See also Ibid., Sec. 1005. To the same effect are 2 Thompson, Corporations (3rd ed. 1927), Sec. 1328; Stevens, Corporations (1936), Sec. 143. This rule does not proscribe all contracts between a director or officer in the corporation. It simply requires that, if such a contract is made, the corporation's interest must be guarded, and it represented, by disinterested agents free from the control or influence of the interested director or officer.

On the other hand, it is also well established that "The right to question the dealings of officers or directors with the corporation property may be lost by ratification or acquiescence, and such right to question the dealings of officers or directors with the corporation property may be lost by estoppel, or by laches." 19 C.J.S., Corporations, Sec. 778(b). For cases illustrating this principle, see Brooks v. Zorn, 24 S.W. 2d 742 (Tex. Civ. App., 1929); Barrett v. Smith, 185 Minn. 596, 242 N.W. 392 (1932); Phoenix Title and Trust Company v. Alamos Land and Irrigation Co., 24 Ariz. 499, 211 Pac. 570 (1922); modified on another ground in 25 Ariz. 103, 213 Pac. 574 (1923); Greenfield v. 5222 Harper Ave. Building Corp., 351 Ill. App. 375, 115 N.E. 2d 357 (1953); King v. Los Angeles County Fair Association, 70 Cal. App. 2d 592, 161 Pac. 2d 468 (1945); see also 19 C.J.S., Corporation, Sec. 763. The same text at Sec. 783 further states that "the corporation or its stockholders may by their acts be estopped to question the transaction." McLaughlin v. Corcoran, 104 Mont. 590, 69 Pac. 2d 597 (1937); Luitwieler v. Luitwieler Pumping Engine Co., 67 Cal. App. 544, 228 Pac. 398 (1924); Lampropulos v. Kedzie-Ogden Building Corp., 4 Ill. 2d 32, 122 N.E. 2d 181 (1954); Von Herberg v. Von Herberg, 6 Wash. 2d 100, 106 Pac. 2d 737 (1940). See also 13 Am. Jur., Corporations, Sec. 1006. To the same effect is 3 Fletcher, Corporation, Secs. 979-986; see also 13 Am Jur., Corporations, Sec. 1022; Anno., 10 A.L.R. 370 (1921); 16 A.L.R. 2d 467, 481 (1951).

III

In considering and applying the foregoing principles of law to the facts in this case, a majority of the judges, being Judges McGehee, Roberds, Hall, Lee, Kyle and Arrington, are of the opinion, and the Court holds, that a distinction must be made between the rights and liabilities of the

parties to this suit before and after the death of Roy R. Underwood on October 16, 1951. The chancellor was amply warranted in his conclusion that during his lifetime, Roy R. Underwood exercised almost complete domination and control over the entire Knox empire, and that "he was the person upon whom the board of directors of Knox of Pennsylvania relied to make the policies for the operations and to direct the affairs of the Knox empire." In addition, he was given a full power of attroney to vote by proxy all of the stock owned by Knox of Pennsylvania in the Mississippi corporation.

The record reflects that Roy ran the business and fixed the policies of the Knox corporations, and that he possessed dominance and control over all of their phases of operation. The directors and stockholders in Knox of Pennsylvania left the business and policies of the Knox companies to Roy without dissent. He was the policy-maker by the consent and acquiescence of the stockholder, Knox of Pennsylvania, and he was the man who decided and established the Knox policy against company ownership of over-the-road trucks. Nor does the evidence indicate that this decision was affected by any bad faith or fraudulent purpose on his part. It was a business-judgment decision which, although manifestly erroneous, was the fixed and undisputed policy of this chief executive of the Knox companies.

Moreover, knowledge of the truck leases by Roy R. Underwood was full and undisputed. He required Knox of Mississippi to furnish him, as president of Knox of Pennsylvania, monthly "clipper reports" of the truck operations. These were prepared by the traffic department of complainant and a copy was sent each month to Roy's office in Knox, Pennsylvania. These reports listed each truck, both company-owned and leased, and reflected the costs of operation and net revenues realized. These clipper

reports came directly to the attention of Roy R. Underwood, and there was considerable correspondence between him and C. R. Underwood, much of which is in the record, about the leased trucks. The correspondence reflects that Roy was kept closely advised on all phases of the trucking operation. On April 8, 1950, he wrote: "I appreciate that we do not want to make capital exenditures for additional truck equipment at this time." On March 19, 1951, he wrote: "I observe that you are operating fourteen trucks under lease and nine trucks under ownership." Defendant Hester on several occasions tried to sell Roy trucks for Knox of Pennsylvania and for Knox of Mississippi, but Hester said he was never able to sell him on the idea of the company owning trucks.

The sole stockholder in Knox of Mississippi was Knox of Pennsylvania. Because of the status of Roy Underwood as the dominant and controlling executive of the Knox companies, and the comprehensive delegation of authority to him by the board of directors of Knox of Pennsylvania, his knowledge of the truck leases was the knowledge of the parent company, as the sole stockholder of complainant. There was a full disclosure of the facts to Roy, and the leasing of trucks during his lifetime met with his approval and was in accordance with his instructions. Under the peculiar circumstances of this case, the Court therefore holds that there was a full disclosure to the stockholders and directors of Knox of Pennsylvania through the man to whom they had delegated the executive powers, Roy R. Underwood. The board of directors gave him authority to determine the business policies of the holding company and its subsidiary. This authority was knowingly vested solely in him. It would be highly inequitable at this late date to permit complainant corporation to recover rentals paid on the truck leases during the period when Roy was the

executive head of the Knox companies, when he had full knowledge of the leases and the revenues derived from them, and when the leases were kept in force and effect by complainant under his express instructions, which were based upon a good faith business-judgment decision by him as the president of both Knox of Pennsylvania and Knox of Mississippi. The chancellor was amply warranted in concluding that, for those reasons, complainant was not entitled to recover truck rentals paid defendants during the lifetime of Roy R. Underwood. Complainant is estopped from asserting a claim to truck rentals while Roy was the executive and dominating head of the Pennsylvania corporation.

Three of the Judges, being Judges Holmes, Gillespie and the writer, disagree with this conclusion, and are of the opinion that, under the principles discussed in Section II, the defendants are liable for truck rentals (less depreciation and other properly deductible expenses) received by them before the death of Roy R. Underwood, as well as after that time. Judges Roberds and Arrington necessarily concur with the decision of the Court denying liability prior to Roy's death, since they are of the opinion that defendants have no liability to complainant for truck rentals prior to the date of the letter of Hon. P. H. Eager, attorney, to C. R. Underwood on May 15, 1953, in which counsel advised him that officers and directors occupy a fiduciary relationship, and that the lease agreements should be approved by the directors and stockholders of both the parent and subsidiary corporations, after a full disclosure.

IV

A majority of the Judges, being Judges McGehee, Hall, Kyle, Holmes, Etheridge and Gillespie, are of the opinion, and the Court holds, that defendants C. R. Underwood, E. F.

Underwood, J. H. Underwood, Mrs. Florence P. Underwood, and E. F. Underwood as trustee, and J. H. Underwood as trustee, for their minor children are each liable severally for the net rentals received by the aforesaid parties from and after January 1, 1952. The extent to which joint and several liability exists will be discussed subsequently. Judge Lee will state his views on this and other points in a separate opinion.

Roy R. Underwood died on October 16, 1951, and on October18, 1951, defendant C. R. Underwood became president of both Knox of Pennsylvania and Knox of Mississippi. He, E. F. and J. H. Underwood knew fully all the facts with reference to the truck leases, and were aware of the large personal profits being made therefrom by themselves and the other defendants. When C. R. assumed the duties of president of both corporations, and E. F. and J. H. Underwood were officers and directors, they were free from the undisputed policy previously made by Roy R. Underwood, which forbade the use of company-owned trucks. C. R. Underwood, upon assuming the presidency of both corporations, and E. F. and J. H. Underwood clearly had the duty at that time to cancel these leases and either to buy trucks for the corporation, or to negotiate at arm's length with lessors not connected with the corporation, or to obtain competitive bids from public contract carriers, or otherwise to make a reasonable effort to obtain the best transportation contracts that they could for the complainant corporation. It was their duty to cancel the leases and to eliminate the large personal profits which were being made on them by them as fiduciaries, by members of their family, and close personal friends and business associates.

C. R. Underwood and the other officers and directors of the Mississippi corporation were entitled to have a reasonable time in which to survey the facts and to make the

necessary changes. We think that from October 18, 1951 to January 1, 1952, would have been, under the circumstances, a sufficient and reasonable time to do this. Cf. 3 Fletcher, Corporations, Sec. 994, p. 491; Briggs v. Spaulding, 141 U.S. 132, 11 S. Ct. 924, 35 L. Ed. 662 (1891); Prudential Trust Company v. McCarter, 271 Mass. 132, 171 N.E. 42, 52 (1929).

We base the foregoing conclusions upon the previously discussed principle that, where the corporation is represented in the transaction by the interested fiduciaries, who deal with themselves, the contract is voidable merely because of the relationship, without proof of actual fraud or of actual injury to the corporation.

However, another legal principle equally applicable to this conclusion as to liability subsequent to January 1, 1952, is that C. R., E. F. and J. H. Underwood, defendants, were fiduciaries in their dealings with this corporation; that they knew that the contracts were unfair to their cestui corporation, causing actual injury to it and draining it of very large profits which these fiduciaries should have directed to the corporation and not to themselves and their relatives, personal friends, and business associates; and that the overwhelming weight of the evidence demonstrates not only the unfairness of the contracts to the corporation, but that these officers acted in bad faith toward complainant, to which they owed a high standard of fidelity and responsibility.

The aforesaid conclusion, with reference to the liability for net rentals received by C. R., E. F. and J. H. Underwood, is likewise applicable to the profits received by Mrs. Florence P. Underwood, the wife of C. R. Underwood, to E. F. Underwood as trustee for Mary Ann Underwood and E. F. Underwood, Jr., and to J. H. Underwood, as trustee for Sandra Ann Underwood, a minor. These defendants were the wife, sons and trustees for the grand-

children, respectively, of C. R. Underwood, and the children of E. F. and J. H. Underwood, directors and officers. The rule is summarized in an annotation in 131 A.L.R. 990 (1941):

"The principal condemning transactions in which a trustee or other fiduciary acts in his own interest, and which might be adverse to the interest of the trust estate, or that of the beneficiaries or others whom he represents, has been found applicable in the vast majority of cases in which the question has arisen, to transactions by, or on behalf of, the spouse or other relative of such fiduciary. . . . . It is settled that the rule against a trustee or other fiduciary engaging in transactions affecting the estate he represents, and particularly against such fiduciary profiting thereby at the expense of the beneficiaries or others represented by him, is applicable likewise as against the spouse or other relative of a fiduciary."

To the same effect are 54 Am. Jur., Trusts, Sec. 466; 3 Fletcher, Corporations, Sec. 946; 90 C.J.S., Trust Secs. 303, 434. In other words, where a fiduciary is barred from making a profit at the expense of his trust or cestui, the prohibition likewise extends to the wife and other close relatives of the fiduciary. Matthews v. Matthews, 1 So. 741 (Miss. 1887) (Children of administrator); Brandau v. Greer, 95 Miss. 100, 48 So. 519 (1909) (wife of guardian of minor ward). The practical reasons for the application of this principle here are manifest. Accordingly, Mrs. Florence P. Underwood, and E. F. and J. H. Underwood, trustees for the three grandchildren, are also liable severally for the profits received by them as individuals and as trustees from the truck rental agreements from and after January 1, 1952.

Judges Roberds and Arrington dissent from these con-

clusions, for the reasons and to the extent set forth in a separate opinion.

There are three minor defendants to this suit. They are: Sandra Ann Underwood, a minor daughter of J. H. Underwood, and Mary Ann Underwood and E. F. Underwood, Jr., the minor daughter and son respectively of E. F. Underwood. The final decree of the chancery court correctly dismissed the bill of complaint as to them. There is no evidence that they knowingly participated with the three directors and officers in the violations of the latters' fiduciary duties. This, however, does not relieve their trustees from the liability of account for and repay to complainant the net rentals received by them as trustees for the trust accounts of these three minors as beneficiaries.

V

The remaining defendants are Miss C. Alberta Luter and W. E. Hester, Jr. Neither of these parties was a director or officer of complainant corporation during the period in question, from and after January 1, 1952. Nevertheless, they were close personal friends and business associates of the defendants who were officers and directors of complainant. The question is whether these persons who had no official connection with complainant are liable for the profits received from the truck leases made by them and in effect from and after January 1, 1952. Before dealing with these two defendants individually, certain basic principles should be noted.

3 Fletcher, Corporations, Sec. 947, states well the fundamental rule, citing numerous cases, affirming it:

"If a third person joins with a corporate officer in dealing with the corporation, with knowledge that he is such officer, the contract may be set aside as to him as well as the corporate officer, and cannot be enforced by either party there-

to, because they are in pari delicto. This is upon the theory that where a stranger participates with the officer of a corporation in the commission of an act of manifest bad faith or breach of duty to it, he, equally with the officer, commits a wrong and ought not to be allowed to derive profit from it. So a transaction between a corporation and one of its directors and a deed executed by an officer of a corporation running to himself as grantee raises at once the question of authority and good faith, and in the absence of absolute good faith may be avoided by the corporation or its stockholders, not only as to the grantee, but as to a third person with notice of the infirmity or knowledge of facts that would put him upon his inquiry."

54 Am. Jur., Trusts, Sec. 305, states:

"The law requires of those dealing with a trustee the exercise of good faith toward the beneficiaries of the trust. Where they participate, with actual or constructive knowledge of a trustee's breach of his duty, in such breach, they are liable to the trust estate or to the beneficiaries for loss caused to the trust estate by the trustee's breach of duty. The rule applies not only in respect of purchasers of trust property who take with actual or constructive notice that the sale is unauthorized and constitutes a breach of trust, but in various other situations, as where one makes a payment to a fiduciary, knowing that the fiduciary intends to misappropriate the money or otherwise be false to his trust, or otherwise knowingly aids or participates in a diversion of trust funds."

Keeping in mind that this is essentially a suit in tort, a summary of the rule is given in 4 A.L.I., Restatement of the Law of Torts, Sec. 874, page 433:

"A person who knowingly assists a fiduciary in committing a breach of trust is himself guilty of tortious

conduct and is liable for the harm thereby caused. . . . The measure of his liability, however, may be different from that of the fiduciary since he is responsible only for harm caused or profits which he himself has made from the transaction, and he is not necessarily liable for the profits which the fiduciary has made nor for those which he should have made. . . . The same principles are applicable where one has colluded with other types of fiduciaries." See also Restatement of Agency, Secs. 312, 313; Restatement of Trusts, Secs. 280-326; 3 Scott, Trusts, Secs. 326-326.6.

A leading case extending liability to third persons who knowingly assist corporate officers and directors in a diversion of corporate funds is American Agricultural Chemical Co. v. Robertson, 273 Mass. 66, 172 N.E. 871 (1930). The American Agricultural Chemical Company owned and controlled all of the capital stock, except qualifying shares, in three subsidiaries which were engaged in the business of purchasing materials from markets and butcher shops and rendering them into oils, tallows, and other products. Robertson, a defendant, was a manager of the rendering department of the chemical company, and exercised authority over the subsidiaries, in one of which he was a president and director. Murphy for a time was president and director of one of the subsidiaries, Brown Company, Inc. Robertson devised a fraudulent scheme of diverting money from the chemical company and its subsidiary, Eastern Oil and Rendering Company, and in this plan, Murphy, who was not an officer of employee of Eastern Oil, knowingly assisted Robertson. The defendant Murphy knew that Robertson was an officer of and in a fiduciary relationship to Eastern Oil. Under this plan, Robertson and Murphy siphoned off a considerable amount of money from Eastern Oil. A large part of the money was used to pay off creditors, of whom Murphy was one. The judgment for the plaintiff corporation was

affirmed on appeal. The Court, citing numerous cases to support its decision, held:

"Funds of a corporation can be lawfully used for corporate purposes only, and if misappropriated by the directors, they and whoever with notice participates with them are jointly and severally liable to the corporation for the loss and damage. . . . Murphy, although not an officer or employee of the Eastern Oil, would be liable for knowingly assisting Robertson, who was in a fiduciary relationship to that corporation, in wrongfully diverting its funds either to himself or to the corporation which he controlled. . . . The fact that Robertson was not also adjudged to be liable for this indebtedness is not a defense for Murphy."

Proctor v. Norris, 285 Mass. 161, 188 N.E. 625 (1934), was a suit by the trustee in bankruptcy of a corporation against an attorney-agent of the former president and dominant director of the corporation. In affirming a judgment against the defendant for knowingly participating in the diversion of corporate funds along with the fiduciary, the Court followed the Robertson case and numerous others. It held:

"The defendant thus came into possession of funds which apparently and in fact belonged to the corporation, and assisted MacClaskey in diverting them to an unlawful use. This was a wrong to the corporation. . . . In those cases, it is true, the person held liable received the money for his own benefit, and not merely for the purpose of distribution to others. But personal benefit is not essential to liability. . . . An agent of a fiduciary who receives trust property and disposes of it in a transaction beyond the legal powers of the fiduciary is liable as a constructive trustee to the beneficiary." See also Durfee v. Durfee

and Canning, 323 Mass. 187, 80 N.E. 2d 522, 527 (1948); Emmons v. Alvoid, 177 Mass. 466, 470, 59 N.E. 126.

In Jackson v. Smith, 254 U.S. 586, 41 S. Ct. 200, 65 L. Ed. 418 (1920), it was held that a person who knowingly joins with a receiver of a building association in violation of the latter's fiduciary duty is liable with the receiver for all profits realized from the purchase.

Irving Trust Company v. Deutsch, 73 F.2d 121 (C.C.A. 2d, 1934), involves a significant application of this rule in a suit by the trustee in bankruptcy of a corporation against former directors and their associates for large profits made in the breach of the directors' fiduciary duties. The directors and third persons who colluded with them in receiving such profits were held liable for the profits received. The Court said that "one who knowingly joins a fiduciary in an enterprise where the personal interests of the latter is or may be antagonistic to his trust becomes jointly and severally liable with him for the profits of the enterprise."

United Zinc Company v. Harwood, 216 Mass. 474, 103 N.E. 1037 (1914), was a suit by the attempted assignee of a corporation against former directors and third persons who confederated or combined with them in violation of the directors' fiduciary duties, which resulted in each of the parties receiving profits at the expense of the corporation. The Court said that strangers who confederate or combine with the directors are accountable for the profits received in violation of the directors' duties, but the bill was dismissed because the right of action was not assignable to the plaintiffs. See also Old Mortgage and Finance Company v. Pasadena Land Co., 241 Mich. 426, 216 N.W. 922 (1928); Attalla Iron Ore Co., v. Virginia Iron, Coal and Coke Company, 111 Tenn. 527, 537, 77 S.W. 774 (1903); First National of Miami v. Vantage Mining Company, 105 Okla. 5, 231 Pac. 266 (1924); see

also other cases cited in 3 Fletcher, Corporations, Sec. 947, quoted above.

Dunagan v. Bushey, 152 Texas 630, 263 S.W. 2d 148, 153 (1953), was a stockholders' derivative suit against corporate officers and a bank, to recover amounts which the bank had loaned to the officers, and they repaid to the bank with a corporate check. The Supreme Court of Texas rendered judgment against the three officers and the bank in favor of plaintiffs. The Court held that there was no question but the bank knew that the money was the property of the corporation. The Court said:

"The bank cannot be heard to say, after participating in the directors wrongful conversion of the corporation's funds to the bank's own substantial advantage, that it did not know of the wrong or that it was not consciously a participant in such wrong. Wichita Royalty Co. v. City Nat. Bank of Wichita Falls, 127 Texas 158, 89 S.W. 2d 394(1), 93 S.W. 2d 143; motion for rehearing overruled 127 Tex. 184, 93 S.W. 2d 143. It necessarily follows that the bank is also liable at the suit of the stockholders for the return to the corporate assets of the $18,025 so appropriated by it to the payment of the individual indebtedness of White, Bushey and Hill."

In Allied Freightways Inc. v. Cholfin, 325 Mass. 630, 91 N.E. 2d 765 (1950), a corporation sued certain directors for mismanagement and wrongful diversion of corporate funds for their personal benefit. The husband was a director and in sole charge of the business. The wife was also a director but not active in management. The Court held that she did not know of many of the wrongful acts of her husband, but she was responsible for the specific sums which she knew were improperly spent for her benefit, because to that extent she participated in the wrong. Hauben v. Morris, 161 Misc. 174, 291 N.Y.S. 96 (1936), was

the stockholders derivative suit for the corporation against certain directors, to recover corporation money acquired by directors in violation of their fiduciary duty. The Court cited with approval and followed the decision of Justice Brandeis in Jackson v. Smith, supra, that third persons who knowingly join a fiduciary in an enterprise in violation of the fiduciary's duty likewise becomes liable for the profits received. Although there are numerous other authorities so holding, the foregoing citations are ample to demonstrate the established rule with reference to third persons.

The defendant, Miss C. Alberta Luter, was assistant secretary and assistant treasurer of the complainant corporation from April 5, 1934 until July 25, 1950, at which time she was elected secretary and assistant treasurer, in which capacity she remained until January 23, 1951. She was a director of complainant from July 26, 1941 until January 23, 1951. During this period she was also the personal assistant and close personal friend of the defendant, C. R. Underwood. She leased four truck units to the complainant corporation, two in 1949 and two in 1950. The contracts continued in effect until the Underwood interests were ousted from the corporation in the latter part of 1953. No leases were made by her to complainant after the death of Roy R. Underwood in October 1951.

However, after that date and through October 31, 1953, Miss Luter received in 22 months net profits of $82,171.03 from the truck rentals, after deducting estimated depreciation at a rate of 25 percent per annum and operating expenses. She was an officer of the corporation for over 17 years prior to her resignation on January 23, 1951. From September 12, 1949 through October 31, 1953, she received net profits in truck rentals of $191,101.52, after deduction of operating expenses and estimated depreciation at a rate of 25 percent per annum. Thus in a period of slightly more

than four years she received from complainant in excess of $47,700 per year in truck rentals. This was in addition to her substantial salaries and bonuses received from complainant corporation up through the date she was discharged on January 23, 1951. It is clear from all of the evidence that Miss Luter received these enormous profits by joining with the three Underwood directors, and particularly C. R. Underwood, the president, in dealing with the corporation, with knowledge that he and the others were in a fiduciary capacity and were improperly diverting funds from the corporation under grossly unfair contracts.

It is undisputed that Miss Luter knew that C. R. Underwood occupied a fiduciary relationship to the corporation. Also, she was his close personal friend, confidant, and business associate, not only in complainant but also in Flowood Corporation. Their joint participation in dealing with the corporation is indicated by the situation outlined previously, whereby after a shortage of over $24,000 was discovered in Miss Luter's accounts with complainant, C. R. Underwood went to Memphis and borrowed $25,000, which was used to pay off this shortage. At the end of 1949, after the shortage had been discovered, C. R. Underwood was instrumental in having the corporation pay her a bonus for that year of $7,000. In January and February of 1950, C. R. Underwood permitted Miss Luter to lease two more trucks to the corporation, and from these two trucks alone in 1950 she received net rentals in excess of $27,000. After this, she repaid C. R. Underwood the money he had borrowed to amortize her shortage. After the discovery of the shortage, C. R. Underwood caused Miss Luter to be paid a salary for the remainder of the year 1949, and her salary of $8400 for the full year of 1950, and a salary of $1050 for the first month and a half of 1951. This was despite the fact that she did no work for Knox following the discovery of the

shortage, except to write up the minutes of about eleven directors' meetings.

Moreover, the 1954 audit of complainant's books by Ernst & Ernst, certified public accountants, shows eleven checks totaling $6,726.48, payable to a Jackson bank, which were charged to freight expenses, which were not stamped by the collection teller, and which were not included in the total of $24,775.91 charged to Miss Luter as of November 1, 1949.

On March 6, 1947, a check of complainant in the amount of $5,114.80, was applied to the payment of two personal notes executed by C. R. Underwood to a Jackson bank. The check stub was in the handwriting of Luter, as were the other entries on the company's books on which this check was charged to Palestine operations freight account. The amount of this check was not charged to C. R. Underwood, nor did Knox ever receive any money in repayment of it.

In July 1953, Miss Luter handled for George H. Underwood, a nephew of C. R. Underwood, and a resident of Pennsylvania, the purchase by him of two trucks from Motors, Inc., arranged for a Jackson bank to loan the money to George, and helped in arranging the leasing of trucks to Knox of Mississippi. George put up no cash. She promptly wrote a letter to C. R. Underwood advising him that the truck purchases for George had been handled by her to completion, and said "Now, George has one of those long list of payments to keep up with. We are not alone in this deal."

After Miss Luter was removed as a director, she continued to have an office in another building on complainant's property, in addition to her work as secretary of Flowood Corporation, of which C. R. Underwood was president. She continued to advise C. R. Underwood in his direction of the affairs of Knox of Mississippi, even after he had moved to

Pennsylvania. For example, John Smith, the traffic manager, had instructed an employee of complainant not to wash any more of Miss Luter's cars. C. R. Underwood became considerably incensed, and wrote Smith on May 31, 1952, that "this had better not happen again . . . Alberta is operating a very substantial business, which I am deeply interested in, both financially and from a personal viewpoint. Whether I am in town or out of town, she speaks with the authority which I have vested in her and anyone interfering with my policy and procedures will not be wanted around this outfit."

Interrogated about this letter, C. R. Underwood testified that "salary-wise" Miss Luter had no connection with Knox of Mississippi. She was in the office which he had arranged for her. But, he said, "She was very helpful to me in directing the affairs of the Knox Glass Bottle Company."

Manifestly when Miss Luter complained about something at Knox, long after she had officially severed connection with the company, C. R. Underwood vigorously corrected the cause of the complaint. And as he said, she was "very helpful" to him "in directing the affairs" of Knox of Mississippi, after he became president of both companies.

A majority of the judges, being Judges McGehee, Hall, Kyle, Holmes, Gillespie and the writer, are of the opinion, and the Court holds, that Miss Luter actively participated and joined with C. R. Underwood, with actual knowledge of the breach of his fiduciary duties, in obtaining profits by truck rentals from complainant corporation, and that she is liable for the net profits received by her from the truck rentals on and after January 1, 1951. All of these and other circumstances render it manifest that C. R. Underwood and Luter were close personal friends and business associates, and that she knowingly participated with him

and E. F. and J. H. Underwood in the breach of their fiduciary duties to the corporation, by the continuance in effect of the leases by her to the corporation after Roy's death. She comes clearly within the universally accepted rule that one who participates with a fiduciary in a breach of his duties, with knowledge that he is violating his obligations, is liable for the profits received thereby from the corporation.

The defendant, W. E. Hester, Jr., was a partner with defendant E. F. Underwood in "Hutco", which partnership in 1949 leased three units to complainant corporation, including the soda-ash truck. Hester was also the general manager of Motors, Inc., which operates a distributorship of trucks, tractors and trailers in the City of Jackson, and which sold all of the motor vehicles to complainant and to the defendants. Principal stockholders in Motors, Inc., are the defendants E. F. Underwood, J. H. Underwood, and Mrs. Florence P. Underwood. Hester was never an officer or director in complainant and did not occupy any fiduciary relationship to it. For that reason, and because the evidence fails to show that he knowingly colluded with the Underwood officers and directors in the violation of their fiduciary duties, a majority of the Judges, being Judges McGehee, Roberds, Hall, Lee, Kyle and Arrington, are of the opinion, and the Court holds, that complainant has no right of recovery for truck rentals received by Hester. Of course, E. F. Underwood is liable for his share of the profits received by Hutco, the partnership in which he and Hester were copartners. Judges Holmes, Ethridge and Gillespie dissent from this conclusion with respect to Hester, and also are of the opinion that even if Hester is not liable, his partner, E. F. Underwood, should be held liable for all of the profits received by the Hutco partnership.

VI.

The next question is whether the three defendants who were directors and officers of complainant corporation after the death of Roy R. Underwood, namely, C. R. Underwood, E. F. Underwood, and J. H. Underwood, are liable not only for the profits which they received individually after Roy's death in the form of truck rentals, but also whether each of these three stated individuals are jointly and severally liable for the profits received (a) by each other, their cofiduciaries and codirectors, and (b) by the other defendants whom they knowingly permitted to receive such profits, and with whom such three directors, defendants, participated in the breach of trust. We think they are.

This is a suit in tort against alleged tort-feasors, former officers and directors of complainant corporation and their close personal friends and business associates. With this principle in mind, 3 Fletcher, Corporations, Sec. 1002, states:

"The liability of a tort-feasor is both joint and several. It follows that the liability of corporate officers for mismanagement is several as well as joint. The liability is joint and several where two or more directors participate in the wrongful acts."

This quoted principle seems to be universal and undisputed. Fletcher cites in support of it cases from twelve states, including National Casualty Co. v. Hallam, 163 Miss. 164, 138 So. 572 (1932). That was a suit in equity by Hallam as receiver for the Mississippi Life and Casualty Insurance Company. It was brought against Cadenhead, who was a fiscal agent of the corporation for the purpose of selling its stock, and against Oubre, who was its treasurer. The Court found that they had conspired together to

defraud the insurance company of $9,000, which they had unlawfully diverted to themselves. The Court held that these two former officers "were jointly and severally liable for each act of wrongful conversion and fraud."

3 Fletcher, Corporations, Sec. 1314, states: "Ordinarily, regardless of who brings the action, one or more of the directors or other officers may be sued, and it is not necessary to join codirectors or other officers although they are equally guilty, since the liability is joint and several."

The rule which condemns contracts made between a director and a corporation to which he owes a fiduciary duty is not limited to the recovery of profits received by the particular director alone. 3 Fletcher, Corporations, Sec. 884, p. 276. In a proper case recovery may be had from a director for profits made by "a party in whom the officer is interested."

19 C.J.S., Corporations, Sec. 764, discusses the duties of directors and officers and their liabilities. It says:

"They are liable jointly and severally for losses of the corporation caused by their bad faith or wilful and intentional departures from duty, their fraudulent breaches of trust, their gross or willful negligence, or their ultra vires acts. . . . A director is not liable for an act complained of unless it is shown that he participated therein or negligently omitted to perform his duty." See Ibid., Sec. 865; McGinnis v. Corporation Funding and Finance Co., 8 F. 2d 532 (D.C. Pa. 1925); Komenarsky v. Brode, 307 Pa. 156, 160 A. 713 (1932); Beard v. Achenbach Memorial Hospital Assn., 170 F. 2d 859 (1948); Hauben v. Morris, 161 Misc. 174, 291 N.Y.S. 96 (1936).

13 Am. Jur., Corporations, Sec. 994, deals with joint and several liability of directors, and states the principle that "where two or more officers join or participate in the wrongful act, they are as a general rule jointly and severally

liable." North Hudson Mutual Building and Loan Assn. v. Childs, 82 Wis. 460, 52 N.W. 600 (1892). The same text further states:

"It has been held that if strangers confederate or combine with directors in a transaction resulting in impairment of the corporate assets, injury to its property, or unlawful profit to themselves, all are jointly liable and may be sued jointly, and each is accountable for the funds or property unlawfully diverted. United Zinc Cos. v. Harwood, 216 Mass. 474, 103 N.E. 1037, Ann. Cas. 1915B, 948."

Many cases state that corporation directors are trustees for the stockholder. All the authorities hold that the relationship is a fiduciary one. 1 Bogert, Trusts, Sec. 16, p. 80, et seq.; 3 Fletcher, Corporations, Sec. 913, p. 331; 19 C.J.S., Corporations, pp. 105, 151. In other words, as 19 C.J.S. Corporations, Sec. 761, p. 105, says, "A director's duties being trust duties or in the nature of the duties of a trustee toward his cestui que trust, his acts are subject to be tested by the rules governing the relation of a trustee to his cestui que trust." It is not entirely accurate to say that a director is a trustee, because he does not hold title to the property, but it is clear that the rule as to whether the liability of directors and officers is joint and several is the same as applies to trustees.

The general rule with reference to joint and several liability of co-trustees is summarized in 2 Scott, Trusts (1939), Sec. 258, p. 1460:

"Where two or more trustees are liable for a breach of trust committed by them jointly, or for a breach of trust committed by one of them for which the others are liable, they are jointly and severally liable to the beneficiaries for the breach of trust. The beneficiaries can join them as defendants and can enforce the liability against any one or

more of them, being limited of course to a single satisfaction."

The same text in Sec. 224.6 states: "Where several trustees are liable for a breach of trust committed by them jointly, or for a breach of trust committed by one of them for which the others are liable under the principles here stated, they are jointly and severally liable to the beneficiaries. The beneficiaries can obtain a decree against all of them jointly, or they may obtain a decree against one or more of them severally. They can, of course, obtain only a single satisfaction for the breach of trust."

Scott, in Sec. 224, outlines the various circumstances under which joint and several liability are imposed upon co-trustees: "Where there are two trustees and a breach of trust is committed by one of them, the other is liable if he is himself guilty of a violation of duty to the beneficiaries. This is the case (1) where he participates in the breach of trust; (2) where he improperly delegates the administration of the trust to his co-trustee; (3) where by his failure to exercise reasonable care he has enabled his co-trustee to commit the breach of trust; (4) where he approves or acquiesces in or conceals the breach of trust; or (5) where he neglects to take proper steps to compel his co-trustee to redress the breach of trust." To the same effect are 4 Bogert, Trusts and Trustees, Secs. 862 and 955, and 1 A.L.I., Restatement of Law of Trusts (1935), Sec. 224.

Marcus v. Otis, 168 F. 2d 658-659 (C.C.A. 2d 1948) reaffirmed in 169 F. 2d 148, applies the rule as to joint and several liability of co-trustees to a stockholder's derivative suit for a corporation against several of its former directors for conversion of corporate funds. There Judge Learned Hand said: "All fiducaries who take part in a conversion are liable jointly and severally for the whole amount,"

citing Sec. 258 of Scott on Trusts. In a similar suit against recreant directors of a corporation, Sigwald v. City Bank, 82 S.C. 382, 64 S.E. 398 (1909), held that the co-directors were joint tort-feasors, liable both jointly and severally. In Komenarsky v. Brode, 307 Pa. 156, 160 A. 713 (1932), in a suit by a corporation against co-directors for fraud in the wrongful payment of salaries and dividends, the Court held that "directors of a corporation are jointly as well as severally liable for mismanagement, willful neglect, or misconduct or corporate affairs."

Denny v. Guyton, 331 Mo. 1115, 57 S.W. 2d 415, 433 (1932), was a suit by a beneficiary of a trust constituting a joint adventure by several men, against several of the defaulting and fraudulent joint adventurers. In affirming a judgment for the plaintiff, the Court said: "But the weight of authority is that where co-trustees have concurred in a breach of trust they are jointly liable. It is stated thus in Pomeroy's Equity, vol. 3 (4th ed.), Sec. 1081, p. 2483: 'The rule is firmly settled that where a breach of trust has affected two or more or all of co-trustees with a common liability, they are liable jointly and severally; each is liable for the whole loss sustained or the whole amount due, and a decree obtained against them jointly may be enforced against any one of them.'" It should be noted that Guyton, one of the defaulting trustees who had died and the suit revived against his wife, did not receive all the profits coming to him, but divided the profits among members of his family. None of those members of his family was a party to this suit. The divisions were made "by and with the consent of the co-trustees." The Court held that the defendants could not complain of the application of joint and several liability rule to them. Another illustrative case applying the joint and several liability rule to co-directors in a suit by a corporation against them is

American Agricultural Chemical Co. v. Robertson, 273 Mass. 66, 172 N.E. 871 (1930), which has been discussed more in detail previously on the question of the liability of third persons who are not fiduciaries, directors or officers, but who knowingly assist fiduciaries in the diversion of corporate funds.

In Hauben v. Morris, 161 Misc. 174, 291 N.Y.S. 96 (1936), a stockholders' derivative suit was brought against directors to recover money acquired by them in violation of their fiduciary duty. They were held liable for the profits. The Court said:

"The nature of the liability of the defendants in this case and the extent of the recovery against them is our next and final consideration. Here, the applicability of the general rule that directors are jointly and severally liable to account for profits earned by breach of their fiduciary duty cannot be gainsaid. Nor does the fact that part of the profits were earned by members of the syndicate who were not directors of the corporation change this result. Mr. Justice Brandeis, speaking for the Supreme Court of the United States in Jackson v. Smith, 254 U.S. 586, at pages 588, 589, 41 S. Ct. 200, 201, 65 L. Ed. 418, stated the rule as follows:

"When he agreed with Smith and Wilson to join in the purchase if Wilson should become the successful bidder, he placed himself in a position in which his personal interests were, or might be, antagonistic to those of his trust. Michoud v. Girod, 4 How. 503, 552 (11 L. Ed. 1076). It became to his personal interest that the purchase should be made by Wilson for the lowest possible price. The course taken was one which a fiduciary could not legally pursue. Magruder v. Drury, 235 U.S. 106, 119, 120 (35 S. Ct. 77, 59 L. Ed. 151). Since he did pursue it and profits resulted the law made him accountable to the trust estate

for all the profits obtained by him and those who were associated with him in the matter, although the estate may not have been injured thereby.' . . . . This joint and several liability dictates the conclusion that the entire profits of the syndicate on the debenture stock purchased from Markle may be recovered from the defendants."

Bingham v. Ditzler, 309 Ill. App. 581, 33 N.E. 2d 939 (1941), was a stockholders' derivative suit against certain officers and directors of the defendant corporation, seeking repayment to the corporation by the co-defendants of excessive bonuses and salaries improperly paid to such directors and officers. The Court affirmed a decree for the plaintiff. It reiterated the established rule that the directors are trustees of the business for the collective body of stockholders, and are subject to the general rules in regard to trusts. Therefore, the trial court "was fully justified in entering the decree which called upon the directors in question jointly and severally to account for the moneys that were received, such accounting to be for the benefit of the defendant company . . . ."

In Allied Freightways, Inc. v. Cholfin, 325 Mass. 630, 91 N.E. 2d 765 (1950), a corporation sued two of its directors, husband and wife, to recover corporate money wrongfully diverted by them for their personal benefit. The husband was a director and in sole charge of the business. The wife was not active in the business and had no knowledge of most of the profits received by the husband. The Court limited her liability to the specific sums which she knew were expended for her benefit. However, the husband was "liable to the corporation for the entire loss thereby sustained by the corporation, and the fact that a part of the funds was used for the benefit of his wife is immaterial in determining the extent of his liability and the amount for which restitution should be made by him." Hence he

was held jointly and severally liable for the total amount of the withdrawals, including both those received by himself and by his wife. See also Dunagan v. Bushey, supra.

In summary, the overwhelming weight of authority is to the effect that corporate officers and directors who knowingly participate in the wrongful diversion of corporate funds are jointly and severally liable therefor. At all times after the death of Roy R. Underwood, C. R. Underwood was president and a member of the Board of Directors of both Knox of Mississippi and Knox of Pennsylvania. At all such times defendant E. F. Underwood was an officer and director of complainant corporation. Defendant J. H. Underwood, for most of the period in question after the death of Roy R. Underwood, was an officer of complainant, from March 1952, and a director from May 1952. Under the foregoing well-established principles, a majority of the Judges being Judges McGehee, Hall, Kyle, Holmes, Ethridge and Gillespie, are of the opinion, and the Court holds, that C. R. Underwood, E. F. Underwood, and J. H. Underwood (from the time he was an officer during the period in question) are jointly and severally liable for the profits received from the truck leases after Roy's death by each of their co-directors as well as by each individually.

A majority of the Judges, being Judges McGehee, Hall, Kyle, Holmes, Ethridge and Gillespie, are further of the opinion, and the Court holds, that C. R. Underwood, E. F. Underwood, and J. H. Underwood (from the time he became an officer during the period in question) are also jointly and severally liable for the profits received from truck leases after Roy's death by these defendants; Mrs. Florence P. Underwood; E. F. Underwood, trustee for Mary Ann Underwood and E. F. Underwood, Jr.; J. H. Underwood, trustee for Sandra Ann Underwood; and C. Alberta Luter.

Judges Roberts and Arrington dissent from these conclusions. And Judges Holmes, Gillespie and the writer would extend the joint and several liability also to Hester's profits.

A majority of the Judges, being Judges McGehee, Hall, Kyle, Holmes, Ethridge and Gillespie, are of the opinion, and the Court holds, that the profits recoverable from the defendants include truck rentals resulting both from the hauling of complainant's property and products, both direct and back-hauls, and from the carrying on some of the back-hauls of the property of third persons. Those latter shipments were made possible entirely through the improper leases to complainant, which arranged for the back-hauls, furnished all terminal facilities, and directed the operating and maintenance personnel. Direct hauls and back-hauls for third persons were closely interrelated, and profits in the form of rentals resulting from both of them stemmed from the breach of duty by fiduciaries, officers and directors of complainant. These rentals were paid to defendants. Therefore, it would be highly unjust and unsound to permit defendants to retain back-haul profits in the form of rentals. For these reasons, the profits recoverable include all rentals on the trucks, comprehending both direct and back-hauls. Judges Roberds and Arrington dissent from this conclusion.

When these profits in the form of net rentals are computed upon the limited remand of this case solely for that purpose, there should be deducted therefrom (a) actual depreciation for the period in question where the trucks have been sold, or, if that is not possible, a theoretical depreciation for the period in question, and (b) any other expenses in connection with the trucks which would be properly deductible in the computation of net rentals received by defendants. These factors should be determined

in accordance with generally accepted and sound accounting practices.

There is no merit in the contention of appellees that appellant ratified the truck leases by its actions with reference to them after the removal of the Underwoods as officers, on December 1, 1953, and is estopped now to repudiate them. Appellant's letters of January 6, 1954 to appellees were made within a reasonable time after the new administration came into power, clearly repudiated the lease agreements, denied their validity, and tendered immediate possession of the trucks to appellees. When appellant purchased some of the trucking equipment from the lessors on February 23, 1954, the bills of sale recited that the purchase was without prejudice to appellant's rights to bring this suit, and appellant reserved all rights to repudiate the leases and recover the money paid under them. The fact that appellant's clerical employees continued to send debit and credit memoranda to defendants pursuant to the previous routine in that respect does not constitute a ratification. Moreover, even assuming a ratification, appellant would still be entitled to recover the profits. Where a contract with corporate officers is voidable, the corporation has several available remedies: To hold the officers on the contract according to its terms, to repudiate it and sue to set it aside, or to affirm the contract and hold the officer for profits received. 3 Fletcher, Corporations, Secs. 1295, 924.

VII

On the cross-bills of defendants and cross-complainants, the appellees, the final decree of the chancery court rendered judgment in favor of Mrs. Florence P. Underwood against appellant for unpaid rentals on her equipment for the months of November and December 1953 and January

and February 1954; and also rendered judgment in favor of appellees, E. F. Underwood, Trustee; J. H. Underwood, Trustee; J. H. Underwood, individually; E. F. Underwood, Trustee; J. H. Underwood, individually; E. F. Underwood, individually; and E. F. Underwood and W. E. Hester, Jr., doing business at Hutco, a partnership; and in favor of C. Alberta Luter, for similar unpaid rentals. In view of our decision that complainant can recover from these defendants, except Hester, profits received on and after January 1, 1952, the decree of the chancery court is necessarily reversed as it applies to the relief granted appellees on their cross-bills, and judgment is rendered here dismissing with prejudice all of the cross-bills of appellees, except that of W. E. Hester, Jr. Judgment is rendered here in favor of Hester on his cross-bill for his one-half interest in the unpaid rentals owed the Hutco partnership by appellant for the months of November and December 1953 and January and February 1954, being the sum of $6,322.19.

The cross-appeals of cross-complainants, execept Hester, contending that they as cross-appellants should be allowed interest on the judgments given them in the final decree from the due date of the obligation rather than the date of the decree, become moot, and are dismissed. The cross-appeal of W. E. Hester, Jr. is sustained, to the extent that interest on the amount owed Hester by Knox of Mississippi should run from the due dates of the respective rentals, and judgment is rendered accordingly.

The final decree of the chancery court dismissed the bill as to the three minor defendants, individually, and no appeal was taken by complainant as to that action. That is not an issue on this appeal. Hence the decree is affirmed in part to that extent. Also, we affirm in part the decree insofar as it grants Hester a recovery for his one-half interest in the Hutco partnership profits, although the trial

court's decree in this respect erroneously combines in the recovery the entire Hutco partnership profits. Moreover, we add to Hester's judgment interest from the due dates of his one-half share of the rentals. Also, the decree denied J. H. Underwood's bonus claim, and he took no cross-appeal as to that, so it is not an issue on this appeal. Other than in these respects, the decree of the chancery court is reversed.

In summary, the decree of the chancery court is reversed and judgment is rendered here adjudicating that the defendants, C. R. and E. F. Underwood, are jointly and severally liable to complainant for the truck profits received by them and are also jointly and severally liable for the truck profits received by all of the other defendants, except Hester, on and after January 1, 1952. Judgment is rendered here adjudicating that the defendant J. H. Underwood is liable to complainant for all truck profits received by him personally on and after March 1, 1952, and he is further jointly and severally liable to complainant for the profits made from the trucking operations by all of the other defendants, except Hester, during a period of time beginning when he became an officer of complainant in March 1952.

Judgment is also rendered here for complainant against E. F. Underwood, as trustee for his minor children, Mary Ann Underwood and E. F. Underwood, Jr., and against J. H. Underwood as trustee for his minor child, Sandra Ann Underwood, for the amount of truck profits received by each of these defendants as trustees beginning on January 1, 1952.

Judgment is rendered for complainant against defendant, C. Alberta Luter, adjudicating that she is liable for the truck profits which she personally received on and after January 1, 1952. Judgment is also rendered in favor of complainant against defendant, Florence P. Underwood,

adjudicating that she is personally liable for the truck profits which she received on and after January 1, 1952. And lastly, judgment is rendered adjudicating that W. E. Hester, Jr., shall recover on his cross-bill from complainant his one-half share, being $6,322.19, of the unpaid truck rentals under the Hutco leases to complainant, with 6 per cent interest from their due dates, and further adjudicating that the bill of complaint is dismissed with prejudice insofar as it applies to Hester.

The judgment of this Court will adjudicate the rights and liabilities of all parties, as determined in this opinion. The only thing remaining to be done with reference to this case is to determine the specific amounts of the judgment to be granted appellant against the appellees, except Hester. That is measured by the net profits from truck rentals received by appellees for a period beginning with January 1, 1952, and including all profits received from that date. Since judgment is rendered here adjudicating the rights and liabilities of the parties, and the only thing remaining to be done is to determine the specific monetary amounts owed appellant by appellees for the period specifically defined in this opinion, the case is remanded to the chancery court solely and exclusively for the limited purpose of determining the monetary amounts of truck profits owed appellant by appellees, except Hester, in accordance with the decisions in this opinion, and then for the rendition of a decree by that court in favor of appellant against appellees, except Hester, for the amounts so determined.

On Direct Appeal, Affirmed in Part, as to W. E. Hester, Jr., but Otherwise Reversed and Judgment Rendered Here for Appellant: on Cross-Appeals, Reversed in Part as to Hester, but Other Cross-Appeals are Dismissed: and Case Remanded Soley for Limited Purpose of an Accounting to Ascertain Amounts Owed Appellant by Appellees, Except Hester.

IN THE SUPREME COURT OF MISSISSIPPI

No. 40,163

KNOX GLASS BOTTLE COMPANY, A MISSISSIPPI CORPORATION

v.

C. R. UNDERWOOD ET AL.

ROBERDS, Justice Dissenting In Part:

Liability, or non-liability, of defendants to this bill may logically rest upon the facts and circumstances existing during three separate periods of time—that is, from 1934 to October 16, 1951, during which time Roy Underwood was president of both the Mississippi and the Pennsylvania Corporations; from October 18, 1951, to March 15, 1953, the date of the Eager letter, during which time C. R. Underwood was president of both corporations, and from March 15, 1953, date of the Eager letter, to November 26, 1953, on which latter date C. R. Underwood ceased to be an official of both corporations.

The majority opinion has adjudicated that no liability rests upon any defendant during the first period of time. I concur in that conclusion. But, the majority opinion has imposed large and heavy personal liability on certain defendants during the second period of time. I disagree with that conclusion.

It should be kept clearly in mind that the basis of liability, and the only ground of such personal liability, was the failure of defendants to change the method of doing business—that is, cancel out the truck leases and use the capital of the Mississippi Corporation, in the purchase and operation of the trucks in the delivery of the output of the plant of the complainant corporation after the death

of Roy Underwood. The chancellor held that whether delivery of the output of the plant should be by leased-trucks or owned-trucks involved a question of business judgment, and that no personal liability resulted from the exercise of that judgment in good faith. I concur in that conclusion as it applies to the second period of time. Whether C. R. Underwood and the other officials of complainant corporation were under duty to change the method of delivery of the output of the plant after the death of Roy Underwood depends upon the facts and circumstances existing prior to and at the time C. R. Underwood became president of the complainant corporation. What were those circumstances and facts? As I relate them they are either not in substantial conflict or have been adjudicated by the chancellor on conflicting testimony.

There was no fraud, overreaching or unfairness in the truck lease contracts. They were all open and above board. They were a part of the records of the complainant corporation. The chancellor found these were facts.

The contracts, and, therefore, the method of doing business under them, had not only been agreed to and approved over the years but had been demanded by the Pennsylvania Corporation, owner of all of the stock of the complainant corporation. Roy Underwood was president of the parent corporation from 1933, and of the complainant corporation from 1934, to the date of his death. He was a man of strong personality. He was considered somewhat of a genius in the manufacture of glass. He held power of attorney of the stockholders of the complainant corporation to vote all of the stock and to "represent" the corporation. That power of attorney was renewed from time to time and existed at the time of his death. He had instructed and demanded that the complainant corporation operate through leased trucks. He was opposed to investing in trucks the capital

of the Corporation. The chancellor found, and the testimony supports the finding, that Roy Underwood, during the time he was president of the corporation, was the czar of the Knox industrial kingdom. Even witnesses for the complainant said he wielded unlimited power over the operation of both corporations. Roy himself expressed great gratification that not a single decision of his, during the time he ran the corporations, was ever questioned, a remarkable fact indeed considering the vast operations of the Knox industrial empire. And as showing conclusively the esteem and regard in which Roy was held by the officers and stockholders of complainant corporation, these officials, after his death, established a trust of one hundred thousand dollars for the benefit of his widow.

The stockholders of the complainant corporation knew all about the truck leases and the method of doing business under such leases. Copies of the leases were in the files of complainant corporation. Such copies were sent to Roy Underwood under his power of attorney from the stockholders. He had copies of all of them. The record before us discloses some forty-five letters written by Roy asking for detailed information as to their terms, the duties and obligations imposed by them, and their efficiency and economy of operation. Full information was given, including a complete record of trips, mileage, rate of pay, and every essential fact involved in them. The leases started in 1946. The first one was to Horton Smith, who, strange to say, signed the bill herein but as a witness was frank enough to say the leases were fair and for the best interest of complainant. The Horton Smith lease was used as a model for the remainder of the leases.

Roy Underwood was present at all of the stockholders' meetings of the complainant corporation. In addition to that, certain other of the officials of the parent corporation

came to Jackson and inspected the Jackson plant. They saw the trucks in operation. They caused an article, accompanied by photographs of themselves and the plant, to be published in a national magazine, which hailed the Knox operations as being models of their kind.

And to show conclusively the Pennsylvania Corporation, owning all of the stock of the complainant corporation, had exclusive control and management of the Mississippi Corporation, it is shown that the Mississippi Corporation paid to the Pennsylvania Corporation two thousand dollars per month for services of the parent corporation in managing and directing the affairs of the complainant corporation.

The truck-lease arrangement was a great benefit to complainant. The chancellor so found and the testimony amply supports the finding. The trucks were able to deliver the manufactured product of complainant to the doors of its customers. They ran day and night. Also, they picked up property on the way back to the plant, for which proper charges of transportation were made for the benefit of the truck lessors, the corporation itself having no power to charge for hauling property of others. This arrangement was taken into consideration in fixing the transportation cost. The chancellor, in his opinion, pointed out one specific instance of the advantage of this truck leasing arrangement. An important ingredient in the manufacture of glass is soda ash. This substance requires special equipment for its transportation. It was being purchased by complainant at Baton Rouge, Louisiana. The owner of a leased truck especially equipped his truck for transportation of soda ash to the plant of complainant, a thing which had never been done before. This truck operated for five years, and during this time saved the complainant $174,831.80. In addition to this, the use of this truck instigated a movement to reduce railroad and common-carrier

freight rates from Baton Rouge to Jackson, Mississippi, which reduction was finally made.

But it is said the lessors realized large profits from these leases. Indeed, that is the main ground for liability. Looking only at the figures the profits were large, especially in recent years. However, when examined in the light of the great advantages to the corporation from their operation and when compared with other transportation rates, it will be readily seen why the complainant adopted the leasing arrangement.

I have noted above the great advantages, as found by the chancellor, of the truck-leasing method over other means of transportation. I will not repeat these. But, aside from such advantages in the actual operations, the truck rates were based upon common carrier freight rates. Indeed, the provisions of the leases brought them under the Interstate Commerce Commission regulations. But there was this difference: The truck rates were based upon full carload lots. Rates for part carload lots are higher than full carload lots. All truck hauls, even consisting of partial loads, took the same rate as full loads. Thus the complainant got the benefit of full load rates on part load hauls, which was indeed an important item. In addition to this, lessors were credited with transportation charges on return hauls, which inured to the benefit of the corporation, which then had no legal right to transport for hire goods of another for its own benefit. Owners had their money in the purchase price of trucks, some especially equipped at large cost, and the depreciation on the trucks was very great. However, to show conclusively the rates charged on the trucks were not excessive, the proof shows without dispute that in 1933-34, in the depth of the depression, the cost of transportation was 12.6% of the total sales; in 1953, transportation compared to sales costs was 12.69%, and

during the past twenty years transportation cost to appellant has averaged 12.69% of the total cost of production, notwithstanding that during that period the cost of transportation has about doubled.

And as bearing upon the cost of transportation, and the effect upon the financial status of complainant corporation, the record discloses a modest financial beginning and an almost unbelievable financial growth. It started with $28,725 cash and secondhand glass machinery of the estimated value of $70,000.00. In other words, its assets amounted to less than one hundred thousand dollars. Its growth was so phenomenal that for the first nine months of 1953, under the management of C. R. Underwood and the truck-leasing system, its net sales aggregated $11,580,-717.70. The Mississippi Corporation made money constantly. The Pennsylvania Corporation lost money constantly. As a matter of fact the Pennsylvania Corporation, owner of all the stock of the Mississippi Corporation, simply used the Mississippi Corporation to pump money into the Pennsylvania Corporation, as is shown, for instance, by the practice of having Mississippi remit to Pennsylvania $24,000.00 per year to pay Pennsylvania for so-called supervision of the Mississippi plant. As further proving the feeder method imposed upon complainant corporation I will give a list of the assessments made by the Pennsylvania Corporation against the Mississippi Corporation and paid by the Mississippi Corporation in one year:

Air Transportation	$ 8,486.07
Engineering	27,487.44
Glass container dues	15,923,17
Knox management	24,000.00
Laboratory Expense	9,142.56
Legal Expense	8,100.00
Glass purchased by parent company	28,879.73

Again, the Mississippi Corporation paid the parent corporation the following dividends in four years:

For 1948	$ 17,734.50
For 1949	54,920.00
For 1950	131,829.25
For 1951	198,734.50
Aggregating	$402,218.25

This is enough to show that the Mississippi Corporation, under its truck-leasing system, was the corporation making the money, and that, contrary to nature, the parent corporation was sucking the life-blood out of its child.

Shortly after his election as president of the two corporations C. R. Underwood had an audit made of the affairs of the Pennsylvania Corporation. This was the first audit ever made of the affairs of that corporation. It disclosed the corporation to be insolvent. It showed liabilities of over two million dollars in excess of assets. The audit revealed overdrafts aggregating $1,555,070.80 and the corporation was endeavoring to meet this situation by an intricate sleight-of-hand arrangement of kiting checks through five banks. It was engaged in a juggling contest trying to switch from one bank to the other what little available cash it had in order to meet outstanding checks. In that situation C. R. Underwood undertook to borrow money and refinance the corporation. He informed the prospective lender that Knox of Pennsylvania needed to borrow one million dollars. The prospective lender, after examining the audit and informing himself as to the financial condition of the corporation, told Underwood one million dollars would do him no good; that the corporation needed three million dollars. On June 24, 1952, as a result of these negotiations, a loan of three million dollars was made by The

Commercial Credit Company, Inc., of Maryland. It took a deed of trust on all of the property, real and personal, of both the Pennsylvania and Mississippi Corporations and their affiliates, to secure that loan. The terms of the trust deed vested in the mortgagee large powers as to how the corporate business should be conducted. As proving the dire financial condition of the Pennsylvania Corporation the mortgagor had to pay seven percent interest on this debt, and, as to some "factors", such as meeting drafts, debtors were obligated to pay nine percent interest. In addition to this, there was a provision in the trust deed which prohibited the mortgagor, under the existing facts, from investing any of the capital of the mortgagor in trucks. It is true that after C. R. Underwood was put out and the new management went in and the new management wanted to adopt the truck-ownership operations that, on request of the mortgagors and under the changed conditions, the mortgagee, to a limited extent, waived the mortgage provision which prohibited investment of corporate capital in trucks. However, that did not alter the fact that the terms of the trust deed, under the existing facts, absolutely forbade the Underwood management investing the capital of the corporation in trucks.

It is pertinent to add here that at one time under the Roy Underwood regime C. R. Underwood was inclined to favor ownership operation of the trucks. Roy Underwood, representing all the stockholders, forbade such investment and operation. But, after C. R. Underwood learned the true financial condition of the Pennsylvania Corporation, he changed his views and concluded it would be bad judgment to invest the corporate assets in trucks and operate them as owners. The total cost of all the trucks necessary to transport the goods of complainant is not shown, but, from what is disclosed by the record, such total cost would

have been in excess of three hundred thousand dollars, to say nothing of the cost of operating and keeping them in repair.

These were the conditions facing C. R. Underwood and his management. Did these conditions demand a cancellation of the truck leases and the purchase and operation of the trucks by the Corporation? Should the law impose disastrous personal money liability for failure to do that? I do not think so. Clearly, as held by the chancellor, the choice of methods of operation of the trucks was a matter of business judgment.

"The fairness of the transaction must be measured not by hindsight but in the light of the circumstances which presented themselves at the time of the transaction. A wisdom developed after an event, and having it and its consequences as a source, is a standard no man should be judged by * * *." Costello v. Costello, 209 N. Y. 252, 103 N. E. 148.

"Corporations must be allowed to function under majority control, as do most institutions in this country, so long as the majority does no actual wrong to the minority or others. Courts are not to be called on to operate or control them except in cases where such interference is essential to justice; and in interfering with what majority has done in such a case as this, real caution must be taken not to work a wrong in striving towards the right * * *." Landstreet, et al. v. Meyer, et al., 201 Miss. 826, 29 So. 2d 653. The foregoing rule was quoted and approved in Hudson v. Belzoni Equipment Co., 211 Miss. 178, 51 So. 2d 223.

The stockholders of complainant corporation knew all about the terms of the truck leases and those who were parties to them and their relations to the corporation and to each other. They affirmed and ratified them. The chancellor found "That the stockholders of complainant corpo-

ration had knowledge of the truck leases throughout the period of time complained of; that complainant continued to operate the trucks under the leases in question after defendants, C. R. Underwood, E. F. Underwood and J. H. Underwood were discharged as officers and directors of said complainant corporation and that by such use and by failing to make complaint in due course it has in effect affirmed, acquiesced in and ratified said leases."

It is a great injustice, in my humble opinion, to impose crushing personal liability on C. R. Underwood and those operating the complainant corporation with him because they did not cancel out these truck leases and invest several hundred thousand dollars of the capital of the corporation in the purchase and operation of trucks under the foregoing conditions. In the first place, as found by the chancellor, it involved only a question of business judgment, which this Court will not attempt to regulate, and in the second place, imposition of personal liability presupposes the system would have been changed had the question of change or no-change been brought before the stockholders of complainant corporation. There is no certainty whatever the change would have been made had the question been presented to the stockholders.

Again, in considering the question of fairness, right, and justice, it should be remembered that the new management, after C. R. Underwood severed his connection with the corporation, renewed and continued at least one of the leases in question.

Once again, looking to the right and justice of the situation, it should be kept in mind that only a part of the cost of transportation was incurred by operating leased trucks. This was the percentage: 33% of the corporate output was shipped in leased trucks; 41% was paid to customers who came for their goods; 17% was shipped in trucks owned by

the corporation; 6% was shipped by rail and 3% by motor freight.

The complainant corporation did not lose a dime by the truck-leasing operations. It is not shown that it could have had its goods transported and delivered one cent cheaper by any other method. Indeed, as above stated, the freight outlay under this method was cheaper than any other available method. Instead of showing a loss it has shown a profit under this system. The burden was upon it, as complainant, to show loss or damage. It has not done so. On the other hand enforcement of these personal decrees will result in this Corporation having transported and delivered a large part of its output for many years without a penny's cost to itself.

Now, as to liability after March 15, 1953, the date of the Pat Eager letter. In this letter Mr. Eager, a very able lawyer, called attention to the quasi-fiduciary relationship existing between corporations and their officers and stockholders. He quoted these rules at length as announced in recognized authorities. He then suggested that he thought these leased-truck contracts should be submitted to the directors and stockholders of the two corporations. This, to me, presents a different situation from that existing before this letter was received by Mr. C. R. Underwood. To that time he and his co-managers of the complainant corporation had a right to rely upon the contracts, which, as shown, had been authorized, confirmed and ratified. After receipt of the Eager letter, however, C. R. Underwood was put upon notice that new lease-truck contracts should be presented to the officers and stockholders of the two corporations. After receipt of this letter two lease contracts were executed by C. R. Underwood as lessor to the complainant corporation as lessee. At that time C. R. Underwood well knew the contents of the Eager letter. He did

not submit his contracts to the directors and stockholders of either corporation. I think that was a breach of duty under these circumstances, and he might well be held liable for the rentals under these two contracts.

ARRINGTON, J., joins in this Dissent.

IN THE SUPREME COURT OF MISSISSIPPI

No. 40,163

KNOX GLASS BOTTLE COMPANY, A MISSISSIPPI CORPORATION

vs.

C. R. UNDERWOOD, ET AL.

LEE, J., concurring in part and dissenting in part.

The majority of the Court, in my opinion, has correctly decided that the appellant is not entitled to recover anything from any of the defendants on account of monies which they obtained from leases during the lifetime of Roy R. Underwood and prior to January 1, 1952. Knox of Pennsylvania owned Knox of Mississippi. Roy R. Underwood, a large stockholder, was president of both corporations. Knox of Mississippi paid a large annual management fee to Knox of Pennsylvania. Roy R. Underwood was, in fact, the czar of both corporations. The stockholders' knowledge, acquiescence and ratification of his dominant management was doubtless the reason why his estate was not even made a party to this litigation.

Besides, in order to set up the corporate organization of Knox of Mississippi, the parent corporation issued one share only of stock each to C. R. Underwood, C. Alberta Luter, and E. F. Underwood, as qualifying shares to make them eligible as directors. But these parties were each

required to endorse their share in blank and return it to the home office of the parent company. They were in fact servile followers and lackeys, without any actual authority whatever. The learned chancellor, constituting a court of equity and conscience, was able to look through this subterfuge and determine the real status of these so-called directors. It is a far cry, in the circumstances of this case, to charge these individuals with the same high duties and responsibilities, which, as pointed out in the announced principles from the cases cited in the majority opinion, devolve upon bona fide directors and managing officers.

Following Roy R. Underwood's death, C. R. Underwood was elected president of both corporations, and acceded to such offices. E. F. Underwood continued in the office of director as he had previously acted. His lackey-like status did not change. C. Alberta Luter had even ceased to be a director prior to Roy R. Underwood's death. She held no connection, either official or otherwise, whatever with the corporation. J. H. Underwood was made a director on May 5, 1952. Obviously his status was the same as his predecessor.

Thus Roy R. Underwood, after his death, was replaced by czar C. R. Underwood, who made no change in policy. J. H. Underwood obtained his lease on September 8, 1948, and, although C. R. Underwood did not cancel it, the majority opinion holds that he is liable for all of the profits which he made after January 1, 1952. The basis for this imposition is that he became a director and was a son of C. R. Underwood. But he was the same kind of director as were the directors before Roy R. Underwood's death. It seems to me that this decision as to him is wholly inconsistent with the Court's opinion as to no liability against directors for the profits from their leases prior to January 1, 1952. Bad faith should not be imputed to a son, who

holds a profitable contract, merely because subsequently his father succeeds to the presidency and does not exercise the power to cancel the contract.

There is a great difference between the relationship of father and son and the closer relationship of husband and wife. This is recognized in the tort field. For instance, even a minor, if emancipated, may sue his father in tort. Lancaster v. Lancaster, 213 Miss. 536, 57 So. 2d 302. Obviously a son of full age may do so. And a mother may sue her adult daughter. Shearon v. Shearon, 219 Miss. 27, 68 So. 2d 71. On the contrary, neither husband nor wife may sue each other in tort. Ensminger v. Ensminger, 222 Miss. 799, 77 So. 2d 308. Nor may an unemancipated minor sue his parents therefor. Durham v. Durham, —— Miss. ——, 85 So. 2d 807. There was no proof that J. H. Underwood was apprised in any way that his lease constituted a fraud on the corporation.

C. Alberta Luter ceased to be one of the lackey directors on July 26, 1951. Thereafter, she had no connection with, and was not even an employee of, the corporation. In my opinion, there is no justification for concluding that she knowingly assisted the officers and directors of the corporation in a diversion of corporate funds, as was dealt with in American Agricultural Chemical Company v. Robertson, 273 Mass. 66, 172 N. E. 871, and other cases cited in the majority opinion. The construction is too strained to say that, under the circumstances here, she entered into a scheme to divert company money to other sources. She was simply carrying out a contract which was profitable to her. The mere fact that her leases were profitable to her is not sufficient, in my opinion, to require her to pay all of her profits into the coffers of the company; and this is true without reference to any friendly or per-

sonal relations, which she may have had with C. R. Underwood.

In my opinion, C. R. Underwood, when he became president, ought to have canceled his own leases, those of his wife, and those which he had previously held and which he changed to, or placed in, the names of E. F. Underwood and J. H. Underwood for the benefit of his grandchildren. Especially was this required of him inasmuch as he was the head of the management and knew that the profits from these leases were large. I cannot excuse the continuance of his own leases and those in which he gave his beneficial interest to his grandchildren. This is likewise true as to the leases of his wife. The relationship of husband and wife is close. With such a relation, there is a oneness, although it may sometimes be a question of which one. I think he should be required to repay the amounts which make up these three items.

However, I see a vast difference between this category and the other leases. The policy of nonownership of the trucks was firmly established. The board of directors of the parent company must have known and assented to that policy. There is no sufficient assurance that the board of directors of the parent company, if the matter had been timely submitted to them, would have changed the policy which had been promulgated and adhered to for such a long period of time by Roy R. Underwood, in whom they had so much confidence.

I find myself in agreement with much of the reasoning so ably presented in the dissenting opinion of Judge Roberds.

APPENDIX "C"

IN THE SUPREME COURT OF MISSISSIPPI

No. 40,163

KNOX GLASS BOTTLE COMPANY, A MISSISSIPPI CORPORATION

v.

C. R. UNDERWOOD, ET AL.

PER CURIAM:

ON SUGGESTION OF ERROR

Of the numerous questions argued in the several suggestions of error the most forceful one is based on the premise that the Court held in its original decision that the lease contracts were valid until Roy Underwood died. This premise is not correctly assumed. The majority of the Court did not consider, and did not hold, the leases valid prior to the death of Roy Underwood. It was held that under the peculiar circumstances of the case the appellant was estopped to assert their invalidity.

In our opinion none of the questions presented justify any change in our decision.

SUGGESTIONS OF ERROR OVERRULED

McGHEE, C. J., AND HALL, KYLE, HOLMES, ETHRIDGE, AND GILLESPIE, JJ., CONCUR. ROBERDS, LEE AND ARRINGTON, JJ., DISSENT.

APPENDIX "D"

THE CHANCERY COURT FIRST JUDICIAL DISTRICT HINDS COUNTY, MISSISSIPPI

Number 47,488

KNOX GLASS BOTTLE COMPANY, *Complainant*

vs.

C. R. UNDERWOOD, ET AL., *Defendants*

FINAL DECREE

This cause this day coming on to be heard at the regular April 1955 term of this court by virtue and pursuant to a former order of this court taking this case under advisement for decision at this time, and the court having prepared its separate opinion embracing its findings of fact and conclusions of law which is on file and is made a part hereof by reference thereto, and the court being of the opinion that the complaint of Knox Glass Bottle Company should be dismissed and that the complainant should recover nothing thereon, and that the relief should be granted the respective cross-complainants in the amounts hereinafter provided:

It is therefore so ordered, adjudged and decreed by the court: (1) That the Bill of Complaint of Knox Glass Bottle Company against the defendants, C. R. Underwood, E. F. Underwood, E. F. Underwood, Trustee, J. H. Underwood, J. H. Underwood, Trustee, Florence P. Underwood, C. Alberta Luter, E. F. Underwood and W. E. Hester, Jr., doing business as Hutco, Mary Ann Underwood, E. F. Underwood, Jr., and Sandra Ann Underwood, is not sustained by the evidence and that said complainant do have and recover

nothing of and from said defendants thereon, and said Bill of Complaint against said defendants is now finally dismissed with prejudice; (2) That Mrs. Florence P. Underwood, as cross-complainant, do have of and recover from Knox Glass Bottle Company, a Mississippi corporation, cross-defendant, in the principal amount of $3239.73 for unpaid rentals due her on her equipment for the months of November and December, 1953, and January and February, 1954, together with six percent. interest thereon from and after this date; (3) That E. F. Underwood, Trustee for Mary Ann Underwood and E. F. Underwood, Jr., as cross-complainants, do have of and recover from Knox Glass Bottle Company, a Mississippi corporation, cross-defendant, in the principal amount of $3723.25 for unpaid rentals due them on their equipment for the months of November and December 1953 and January and February, 1954, together with six percent. interest thereon from and after this date; (4) That J. H. Underwood, Trustee for Sandra Ann Underwood, as cross-complainant, do have of and recover from Knox Glass Bottle Company, a Mississippi corporation, cross-defendant, in the principal amount of $2158.34 for unpaid rentals due her on her equipment for the months of November and December, 1953 and January and February, 1954, together with six percent. interest thereon from and after this date; (5) That J. H. Underwood, cross-complainant, do have of and recover from Knox Glass Bottle Company, a Mississippi corporation, cross-defendant, in the principal amount of $6859.66 for unpaid rentals due him on his equipment for the months of November and December 1953 and January and February, 1954, together with six percent. interest thereon from and after this date; (6) That the bonus claim herein of J. H. Underwood is without merit and should be and is now denied and finally dismissed as having been settled by previous check

of the company as a disputed item and account; (7) That E. F. Underwood and W. E. Hester, Jr., doing business as Hutco, as cross-complainants, do have of and recover from Knox Glass Bottle Company, a Mississippi corporation, cross-defendant, in the principal amount of $12,644.37 for unpaid rentals due them on their equipment for the months of November and December, 1953, and January and February 1954, together with six percent. interest thereon from and after this date; (8) That C. Alberta Luter, as cross-complainant, do have of and recover from Knox Glass Bottle Company, a Mississippi corporation, cross-defendant, in the principal amount of $9935.01 for unpaid rentals due her on her equipment for the months of November and December, 1953 and January and February 1954, together with six percent. interest thereon from and after this date; (9) That the complainant, Knox Glass Bottle Company, is assessed with all costs of this suit to be taxed by the Clerk of this Court, and for all of which proper process may issue; (10) That the complainant and cross-defendant, Knox Glass Bottle Company, feeling aggrieved by said decree, in open court prayed for an appeal to the Supreme Court of the State of Mississippi and such appeal is hereby allowed.

ORDERED, ADJUDGED AND DECREED, this June 10, A. D., 1955.

(sgd) L. ARNOLD PYLE,
Chancellor.

APPENDIX "E"

MONDAY, OCTOBER 8, 1956 COURT SITTING

40,163

KNOX GLASS BOTTLE COMPANY, A MISSISSIPPI CORPORATION

vs.

C. R. UNDERWOOD, ET AL

This cause having been submitted at a former day on the record herein from the Chancery Court of the First Judicial District of Hinds County, Mississippi, and this Court having sufficiently examined and considered the same and being of the opinion that there is error therein, doth order and adjudge that the decree of said Chancery Court rendered in this cause on the 10th day of June, 1955, be and the same hereby is reversed in part and affirmed in part, and the Court now here proceeding to render and enter the decree that should have been entered in the court below, doth order, adjudge and decree, as follows:

1. That the defendants and appellees, C. R. Underwood, E. F. Underwood, individually, J. H. Underwood, individually, Mrs. Florence P. Underwood, C. Alberta Luter, E. F. Underwood, as trustee for Mary Ann Underwood and E. F. Underwood Jr. and J. H. Underwood, as trustee for Sandra Ann Underwood, are each liable severally to the complainant and appellant for all of the net profits as shown by the evidence to have been received by each of the aforesaid parties from and after January 1, 1952, by virtue of the truck leases existing between said parties and appellant. That the complainant and appellant, Knox Glass Bottle Company, do have and recover from defendants and appel-

lees, C. R. Underwood, E. F. Underwood, individually, J. H. Underwood, individually, Mrs. Florence P. Underwood, C. Alberta Luter, E. F. Underwood, as trustee for Mary Ann Underwood and E. F. Underwood, Jr., and J. H. Underwood, as trustee for Sandra Ann Underwood, all of the net profits shown by the evidence to have been derived by said parties from Knox Glass Bottle Company from and after January 1, 1952, on account of and by virtue of any and all leasing of trucks and/or trailers to the said complainant by said parties, such profits to include profits from all of the operations of said vehicles from and after said date, including backhauls, and such recovery to be from each of the above named parties severally according to the amount of such net profits received by each of them, together with lawful interest thereon.

2. That the complainant-appellant, Knox Glass Bottle Company, do have and recover from the defendant-appellee, E. F. Underwood, trustee for E. F. Underwood, Jr. and Mary Ann Underwood, and defendant-appellee, J. H. Underwood, trustee for Sandra Ann Underwood, all such net profits as shown by the evidence to have been received by them for the account of their children, from and after January 1, 1952, together with lawful interest thereon, and the funds and assets in their hands as such trustee which were derived from such net profits are subjected to this liability.

3. That in addition to their personal and several liabilities, as hereinabove set forth, the defendants, C. R. Underwood, E. F. Underwood and J. H. Underwood, are jointly and severally liable to refund to complainant-appellant, Knox Glass Bottle Company, all of such net profits as shown by the evidence received by each of them, and by their co-fiduciaries and co-directors, and also by the other defendants whom they wrongfully permitted to make such profits.

4. That the complainant-appellant, Knox Glass Bottle Company do have and recover of and from the defendant,

C. R. Underwood, all of the net truck profits shown by the evidence to have been received from complainant-appellant by the defendants, C. R. Underwood, E. F. Underwood, individually, J. H. Underwood, individually, Mrs. Florence P. Underwood, C. Alberta Luter, E. F. Underwood, trustee for E. F. Underwood, Jr. and Mary Ann Underwood, and J. H. Underwood, trustee for Sandra Ann Underwood, from and after January 1, 1952, together with lawful interest thereon.

5. That the complainant-appellant, Knox Glass Bottle Company, do have and recover from the defendant, E. F. Underwood, all of such net truck profits shown by the evidence to have been received from complainant-appellant by defendants, C. R. Underwood, E. F. Underwood, individually, J. H. Underwood, individually, Mrs. Florence P. Underwood, C. Alberta Luter, E. F. Underwood, trustee for E. F. Underwood, Jr. and Mary Ann Underwood, and J. H. Underwood, trustee for Sandra Ann Underwood, from and after January 1, 1952, together with lawful interest thereon.

6. That the complainant-appellant, Knox Glass Bottle Company, do have and recover from the defendant, J. H. Underwood, all of the net profits as shown by the evidence to have been received by defendants, C. R. Underwood, E. F. Underwood, individually, J. H. Underwood, individually, Mrs. Florence P. Underwood, C. Alberta Luter, E. F. Underwood, trustee for Mary Ann Underwood and E. F. Underwood, Jr., and J. H. Underwood, trustee for Sandra Ann Underwood, from and after March 2, 1952, together with lawful interest thereon.

7. That this case be and the same hereby is remanded to the Chancery Court of the First Judicial District of Hinds County, Mississippi, for the sole and limited purpose of determining the monetary amounts of the aforesaid net truck profits owed to appellant by appellees, except Hester, and to determine such net profits there shall be deducted

from the net rentals paid to the defendants the following items only: (a) actual depreciation for the period in question, where the trucks have been sold, or if that is not possible, a theoretical depreciation for the period in question, and (b) other expenses, if any, in connection with the trucks which would be properly deductible in the computation of net rentals or profits received by said defendants. The lower court shall follow these principles in dealing with this case after remand, and the mentioned factors shall be determined in accordance with generally accepted and sound accounting practices.

8. This decree adjudicates and fixes the rights and liabilities of all of the parties in accordance with the opinion rendered herein. Upon remand to the Chancery Court the court below shall be limited to a determination of the specific amounts of the judgments to be granted appellant against the appellees, except Hester, as hereinabove set forth, and then for a rendering of a decree by that Court in favor of Knox Glass Bottle Company against appellees, except Hester, for the amounts so determined.

9. Insofar as the decree of the court below grants relief to appellees other than W. E. Hester on their cross-bills, said decree is reversed, and the cross-bills of all defendant-appellees, except the said W. E. Hester, Jr., are hereby dismissed with prejudice.

10. The cross-appeals of all appellees and cross-complainants, except appellee W. E. Hester, are hereby dismissed with prejudice.

11. The defendant-appellee and cross-appellant, W. E. Hester shall have and recover from and of the appellant his one-half interest in the unpaid rentals to the Hutco partnership for the months of November and December, 1953, and January and February, 1954, in the principal amount of $6,322.19, plus 5% thereof as statutory damages. It is fur-

ther ordered that the cross-appeal of W. E. Hester, Jr. is sustained to the extent that interest on said principal amount of $6,322.19 should run from the due date of the respective rentals.

12. It is further ordered, adjudged and decreed that the complainant-appellant, Knox Glass Bottle Company, do have and recover from appellees, C. R. Underwood, E. F. Underwood and J. H. Underwood, individually, E. F. Underwood, trustee, J. H. Underwood, trustee, Florence P. Underwood, and C. Alberta Luter, all costs in the court below and in this Court, taxed and to be taxed, for which let execution issue.

13. It is further ordered that the supersedeas appeal bond executed and filed by appellant in this cause and the surety thereon are discharged as to all appellees except Hester.

APPENDIX "F"

MONDAY, JANUARY 14, 1957

40,163

KNOX GLASS BOTTLING COMPANY

vs.

C. R. UNDERWOOD, ET AL

This cause this day came on to be heard on the suggestion of error filed herein and this court having sufficiently examined and considered the same and being of the opinion that the same should be overruled doth order and adjudge that said suggestion of error be and they are hereby overruled.

APPENDIX "G"

MONDAY, MARCH 18, 1957 COURT SITTING

40,163

KNOX GLASS BOTTLING COMPANY

vs.

C. R. UNDERWOOD, ET AL

This cause this day came on to be heard on the Motion of the appellee to stay the mandate and order the original records and documents sent up to the Supreme Court of the United States and this court having sufficiently examined and considered the same and being of the opinion that the same should be overruled doth order and adjudge that said Motion be and the same is hereby overruled.

(5071-6)

FILED
MAY 10 1957
JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956.

No. 959.

C. R. UNDERWOOD ET AL.,
Petitioners,

vs.

KNOX GLASS BOTTLE COMPANY ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

BRIEF OF RESPONDENTS IN OPPOSITION.

CHARLES B. SNOW,
900 Milner Building,
Jackson, Mississippi,
JUNIOR O'MARA,
900 Milner Building,
Jackson, Mississippi,
Counsel for Respondents.

BUTLER, SNOW, O'MARA, STEVENS & CANNADA,
Jackson, Mississippi,
Of Counsel.

R. L. MERRIMMALL, INC., 1108 OAK STREET, KANSAS CITY 6, MO. HARRISON 1-9080

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BRIEF OF RESPONDENTS IN OPPOSITION.

OPINIONS BELOW.

The opinion of the Supreme Court of Mississippi is reported in 89 So. 2d 799, but has not yet been reported officially in the Mississippi Reports.

The opinion of the Supreme Court of Mississippi overruling the Suggestions of Error is reported in 91 So. 2d 843, but has not yet been reported officially in the Mississippi Reports.

JURISDICTION.

Petitioners seek to invoke the jurisdiction of this Court under the provisions of Chapter 646 of the Act of June 25, 1948, *62 Stat. 929, Title 28, U. S. C., Section 1257 (3)*.

In our opinion there is no basis to sustain the jurisdiction of this Court in this case.

As we understand the rule, final judgments rendered by the highest court of a state may be reviewed by the Supreme Court by way of certiorari only in three situations:

1. Where the validity of a Federal treaty or statute is drawn in question.

2. Where the validity of a State statute is drawn in question on the grounds of its being repugnant to Federal Law; and

3. Where a title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or a commission held or authority exercised under, the United States.

Not one of these jurisdictional requisites exists in the present case.

The present case is an action by respondent, a Mississippi corporation, against petitioners, who are former officers and directors of such Mississippi corporation, and certain close relatives and personal friends and associates of such officers and directors, all of whom were and are residents of the State of Mississippi. By this suit respondent as plaintiff or complainant seeks to recover from petitioners as defendants by way of restitution, large personal profits, which petitioners made at the expense of such

Mississippi corporation, by direct personal dealings with the corporation in flagrant violation of their clear fiduciary duty. The money sought to be recovered was actually paid to petitioners in the State of Mississippi, the transactions all took place in the State of Mississippi, the parties were all residents and citizens of the State of Mississippi, and there is nothing here involved but the equity jurisprudence of the State of Mississippi.

STATUTES INVOLVED.

There are no constitutional provisions, treaties, statutes, ordinances or regulations, state or federal, involved in this case.

There is here involved only a decision of the Supreme Court of the State of Mississippi ruling on the liability of fiduciaries, their family and persons confederating and associating with them, to restore profits wrongfully taken at the expense of the corporation they were supposed to represent, and in breach of their fiduciary duty.

QUESTIONS PRESENTED.

The only question involved is the liability under the law of the State of Mississippi of the petitioners, who were fiduciaries, and those confederating with them, to make restitution of money which they have wrongfully taken from a corporation to which they owed a fiduciary duty.

There is no federal question involved. The judgment of the Supreme Court of Mississippi is based entirely upon the law of the State of Mississippi and none other.

STATEMENT OF THE CASE.

Respondent deems it necessary to correct certain inaccuracies and omissions in the statement of petitioners. Counsel who prepared the petition did not participate in the trial of this case in the trial court nor in the presentation thereof before the Supreme Court of Mississippi. The numerous misstatements, inaccuracies and omissions contained in petitioners' statement of the case are no doubt attributable to that fact. This fact too has possibly contributed to the obvious misconception which petitioners have of the holding of the Supreme Court of the State of Mississippi.

Moreover, we respectfully suggest that the petition violates Rule 23 of this Court, and particularly paragraph 4 thereof in that it does not present the essentials of the case with "accuracy, brevity, and clearness." The petition is not at all direct and concise.

To answer each and every misstatement and inaccuracy contained in the petition would extend this brief in opposition beyond permissible limits. The facts of this case are accurately stated in the majority opinion of the Supreme Court of the State of Mississippi reported in 89 So. 2d 799.

Within the limits of this brief, however, we shall undertake to state the actual facts of the case briefly, in order that the Court may be aided in its deliberations.

Petitioners have filed in this Court a document which they term an "abridged record." It consists solely of portions of the actual record selected by petitioners for presentation to this Court; that which petitioners would have the Court notice to the exclusion of all else. It contains

none of the testimony which was before the Court. The actual official record in this case consists of sixteen volumes plus hundreds of exhibits. This actual record was the record before the Mississippi Supreme Court. The true picture of this case cannot be obtained unless the actual record of the four weeks trial is considered, as it was by the Mississippi Supreme Court.

This is a suit in equity by a Mississippi corporation against four of its former officers and directors, and persons standing in close business or family relationship with them, seeking restitution of large personal profits which the defendants took from such Mississippi corporation by virtue of direct transactions and dealings with the corporation, while certain of the defendants were directors and officers. It is not, as is repeatedly stated by petitioners, an ordinary tort action, but is a suit in equity for restitution of money taken in violation of a fiduciary duty. *Ventress* v. *Wallace*, 111 Miss. 357, 71 So. 636.

Respondent is Knox Glass Bottle Company, a Mississippi corporation engaged in the manufacture and sale of glass containers, having its principal place of business in Mississippi.

All of the capital stock of respondent is owned by Knox Glass Bottle Company, a Pennsylvania corporation.

The capital stock of Knox of Pennsylvania is owned by from 160 to 220 individual shareholders, comprising the class commonly referred to as the general public.

Thus, neither of the corporations was a family-owned corporation, and the Mississippi corporation is and at all times has been a separate and distinct legal entity.

For the sake of brevity the two corporations will be referred to as Knox of Mississippi and Knox of Pennsylvania.

Petitioner, C. R. Underwood, a Mississippi resident, was a director and officer of the respondent corporation from the time it was formed in 1933 until the latter part of 1953. Petitioner, C. R. Underwood, was also president of both Knox of Mississippi and Knox of Pennsylvania from October 18, 1951, until November, 1953.

From and after October 18, 1951, petitioner, C. R. Underwood, was in full charge of the management of both Knox of Mississippi and its parent, Knox of Pennsylvania.

Petitioner, E. F. Underwood, is the son of C. R. Underwood and was a director and officer of Knox of Mississippi from April 17, 1939, until his resignation in November, 1953. Said petitioner was also a trustee of a certain trust created by his father for the benefit of the minor daughter and son of petitioner E. F. Underwood.

Petitioner, J. H. Underwood, is also a son of C. R. Underwood. J. H. Underwood was likewise an officer and director of Knox of Mississippi from March 1, 1952, until November, 1953. Said petitioner was also the trustee under a certain trust created by C. R. Underwood for the benefit of the minor child of petitioner J. H. Underwood.

Petitioner, Florence P. Underwood, is the wife of petitioner C. R. Underwood.

Petitioner, C. Alberta Luter, was an officer and director of the respondent from April 17, 1939, until January 23, 1951. Said petitioner is now and for many years past has been the confidential personal secretary and close personal friend of petitioner, C. R. Underwood.

Prior to the year 1946 respondent began the operation of a fleet of its own trucks and trailers (hereinafter referred to as trucks for the sake of brevity) for the purpose

of hauling its manufactured products and raw materials and supplies to its various customers and between various suppliers and plants.

In the year 1946, respondent, under the management of the petitioners, leased two trucks from certain individuals who were not directors or officers of respondent and bore no fiduciary relationship thereto. At first the lessors of the trucks lost money, but as time went on the leases became highly profitable to the two lessors. Respondent proceeded to operate its own trucks and the two leased trucks for a sufficient length of time for the petitioners who were in charge of the operation of respondent's business to recognize and have actual knowledge of the fact that the ownership and operation of said trucks was a proven profitable venture on the part of persons leasing the trucks. Until the highly profitable nature of the leases was *conclusively* established, petitioners were not willing to venture leasing trucks to respondent.

Thereupon, with actual knowledge of these facts, the petitioners, who were in active charge and control of the operations of respondent, began to take advantage of this opportunity for the making of profits, and from time to time over a period of years purchased trucks and equipment with money they took from respondent and undertook to lease the same to respondent for the purpose of transporting respondent's manufactured products and commodities and raw materials and supplies.

The terms of said leases were negotiated with the respondent by those petitioners who were officers and directors of respondent in charge of the actual management thereof.

In every instance where one of the petitioners who were directors and officers of respondent would make a

lease to respondent, one of the other petitioners who was a director and officer would undertake to sign the lease on behalf of the corporation (89 So. 2d 808).

Each and every one of the purported lease contracts was executed in the State of Mississippi, and all monies derived thereunder were paid to petitioners in the State of Mississippi.

In connection with these leases, at no time were the interests of respondent represented and guarded by disinterested agents free from control or influence of the interested officers and directors.

The evidence showed without dispute that by virtue of these leases to respondent, the petitioners received fabulous and exorbitant profits which they took from respondent.

The Mississippi Supreme Court found as a fact that the salaried employees of respondent supervised the operation, the routing and the repairing of all leased trucks. Respondent provided all storage and terminal facilities, handled all problems and costs of traffic and safety, except cost of liability insurance, planned all the truck movements, arranged for all backhauls and directed and supervised all of the operating and maintenance personnel. Respondent did all the bookkeeping necessary in order to keep detailed records on each truck's movements, the revenues of the trucks, and the classes and amounts of the expenses. All of these services were performed by respondent at its own expense, and respondent was never reimbursed in any way by petitioners for any of these costs.

In short, everything connected with the truck operation except the bare ownership of the trucks was the property of and responsibility of respondent.

Under the purported lease agreements, respondent paid to the lessors as rental for the trucks, a sum equal to the published carload railroad freight rate on all tonnage which the truck was used to transport, after first deducting from that amount, drivers' wages, insurance premiums, gasoline and oil, repairs and maintenance, tires, and other deductions in connection with the use and operation of the vehicle.

The leases were on a month to month basis with the right in either party to terminate same on thirty days written notice.

In other words, respondent credited the lessors with the amounts of rentals earned, paid the operating expenses, and charged them to the petitioners' accounts. The balance was paid to the petitioners each month by check of the respondent. Hence, payments by the respondent represented net profits to petitioners after having paid all operating expenses, except depreciation and personal property taxes.

The evidence showed without dispute, and the Supreme Court found as a fact, that in the southern region of the United States public contract carriers, on the average, earned a profit of only 6.23 per cent of the amount of revenues received.

The Court further found that the evidence showed that the petitioners' leased trucks made a profit of 33.03 per cent of the amount of revenues received.

In other words, petitioners took from their dealing with respondent *more than five times* as much *net profit* as public contract carriers operating in the same area earned (R. 1762-1768, 3716-3717, 89 So. 2d 810).

The evidence showed and the Supreme Court found as a fact, that the profit earned by public contract carriers

operating in the southern area resulted from negotiations between such public contract carriers dealing at arms' length wth business men representing an industry which had a product to transport.

The Supreme Court found as a fact that there were *no* such arms' length negotiations between respondent and petitioners with respect to the trucks leased from the petitioners (89 So. 2d 810).

Computing the profits made by petitioners on another basis, the evidence showed, and the Supreme Court found as a fact, that the petitioners' trucks made profits in excess of 100% of their cost per annum, and in the case of one truck, more than 783% of the cost thereof, *over a period of less than five years* (89 So. 2d 811).

The evidence showed without dispute and the Supreme Court found as a fact, that from October, 1948, through October 31, 1953, petitioners and two nephews of C. R. Underwood (who although defendants in the suit were non-residents of the State and not served with process, and thus are not involved in the present proceeding) were paid $1,054,519.41 as net revenues after deduction of operating expenses by respondent. This sum was actually paid to said parties by respondent, while respondent was in the hands of and dominated by petitioners.

After giving said parties credit for estimated depreciation at the rate of 25 per cent per year, petitioners and said two nephews over said period of time received and were paid a clear net profit of $890,350.43.

The evidence also showed, and the Supreme Court found as a fact, that the leased trucks which were originally bought by the petitioners and leased to respondent were purchased with small or no down payments, *and the*

balance of the purchase price as well as the down payments, were paid off in full from net profits taken from respondent by petitioners. The profits were so high that the rentals which petitioners took from respondent would completely cover the purchase price within a period of from five to ten months (89 So. 2d 810).

After petitioners had taken from respondent in net profits sufficient to cover the purchase price of the trucks, each of the petitioners continued to rent the trucks to respondent under these leases, which were cancellable on thirty days notice, and respondent paid each of the petitioners over and over again for these trucks. After respondent had paid petitioners the purchase price in full for these trucks within five to ten months, from then on all the money which petitioners took from respondent was pure "gravy."

The Supreme Court found as a fact that when the leases were made to respondent by the petitioners, the petitioners who were officers and directors and their associates actually knew that the net profits from the trucks would pay off the purchase price within five to ten months, and that thereafter, the rentals, except for depreciation and personal property taxes, would be clear profit (89 So. 2d 808).

The record clearly shows that after the middle of the year 1948, petitioner C. R. Underwood and the other officers and directors of the respondent had full knowledge of the large and disproportionate profits being realized by the leased trucks (89 So. 2d 811).

Other persons, not members or friends of the Underwood family and not directors and officers of respondent, got an inkling of the fact that these fantastic profits were being made, and sought on several occasions to lease trucks

to respondent, but petitioners denied them the opportunity (89 So. 2d 806). The Underwoods and their close associates retained this "plum" for themselves.

During all of the time that the Underwoods and petitioner Luter were deriving these exorbitant and fantastic profits from the leasing of trucks to respondent, each of said petitioners was being paid huge salaries plus handsome bonuses by respondent (Exhibit C-105, R. 1617).

The petitioners who were paid these handsome salaries and bonuses were paid for services rendered and to be rendered as officers and directors of the corporation and for their undivided loyalty. However, as soon as it was conclusively established that the truck leases resulted in tremendous profits to the lessors, instead of negotiating better terms for respondent, these fiduciaries immediately began to lease trucks to respondent themselves and derive and obtain these tremendous profits for themselves at the expense of respondent.

The evidence showed that despite these huge profits being made by the petitioners, the petitioners, who were officers and directors of the respondent, never made any attempt whatsoever to obtain more favorable trucking arrangements for respondent.

The evidence showed, and the Supreme Court found, that despite the fact that the petitioners had actual knowledge of all of the facts mentioned above, the petitioners who were managing officers and directors of respondent made no effort to obtain a better deal for the respondent with the lessors, or to negotiate more favorable leases, or to obtain competitive bids from public contract carriers (89 So. 2d 810, 811).

Indeed, as a glaring example of the petitioners' attitude, even after counsel advised C. R. Underwood that the

fiduciaries should not lease these trucks to the respondent without full knowledge and consent of all interested stockholders, C. R. Underwood not only continued to lease the trucks to respondent, but caused his family to put on additional leased trucks (89 So. 2d 811).

All of this was done without the directors and stockholders of the parent corporation having knowledge of the true situation (89 So. 2d 811).

The Supreme Court found as a fact that respondent did not receive one single benefit from operating the trucks as lessee of the petitioners that it would not have received from operating the trucks as the owner thereof. The Supreme Court further found that if respondent had owned the trucks and retained the rentals or net profits which it paid to petitioners, it would have received each and every benefit which it actually received from the trucking, would have owned the trucks fully paid for, and would have had hundreds of thousands of dollars more cash for itself (89 So. 2d 810).

The evidence further showed that if respondent had bought and paid for all of the trucks which were leased from petitioners, and if respondent had paid all income taxes due, the respondent's net cash position would have been improved by $495,089.76, and in addition to saving this amount of money, respondent would have owned 19 trucks and trailers which were fully paid for (R. 3714).

The record in this case and the opinion of the Supreme Court of Mississippi discloses a calculated course of dealing throughout the years involved whereby those petitioners who were managing officers and directors of the respondent have by many devious and ingenious means and methods conducted the operations of respondent for their own personal benefit and to the great detri-

ment of the respondent. The record shows a story of financial transactions by these petitioners which are remarkable for the ingenuity they reveal rather than acceptable as models of ethical propriety. It is impossible to fully discuss all of these matters within the permissible limits of this brief, and therefore we have confined ourselves to a brief presentation of that which we consider material in regard to the activities of the petitioners by which they took large sums of money from respondent under the truck leases.

During the fall of 1953, certain individual stockholders of Knox of Pennsylvania, who were not connected with the Underwood family, received information concerning the irregularities and wrongful activities on the part of petitioners. Thereafter, at the regular annual meeting of the stockholders of Knox of Pennsylvania on December 1, 1953, the term of office of all of the then members of the board of directors of Knox of Pennsylvania and Mississippi was declared at an end and a new board of directors was elected.

The petitioner, C. R. Underwood, was suspended from employment as general manager and subsequently discharged.

After investigation had been conducted and counsel had been consulted, Knox of Mississippi repudiated the truck lease agreements with petitioners and brought the present suit. (Only a part of the letter of repudiation is quoted in the petition.)

The suit was based upon the theory that the management of respondent corporation was committed to the charge of the petitioners, who were directors and officers, upon the trust and confidence that the interests of respondent would be cared for and safeguarded and upon

the further trust and confidence that such directors and officers would not either directly or indirectly derive any personal profit, benefit or advantage by reason of their position that was not enjoyed in common by all the stockholders (R. 27-28).

The suit was not a mere tort action, but was a suit in equity for an accounting and restitution, upon the theory that petitioners, who were managing officers and directors of the respondent corporation, and those confederating with them, utilized their fiduciary positions for personal profit and unjust enrichment to themselves in violation of a clear fiduciary duty.

The principal defenses raised in the pleadings and evidence of the petitioners in the lower court are set forth in the opinion of the Supreme Court of Mississippi at page 805 of 89 Southern 2d. Summarized they are: (1) The facts in regard to the truck leases were reported to Roy R. Underwood, the older brother of petitioner, C. R. Underwood, who was president of Knox of Pennsylvania and Knox of Mississippi until his death in October, 1951 (at which time petitioner C. R. Underwood succeeded him as president of both corporations), and that Roy, representing the Pennsylvania corporation, which owned all of respondent's stock, had established a policy not to buy trucks but to lease trucks, and petitioners were acting pursuant to this direction by Roy Underwood. (2) That Roy Underwood had full knowledge of all the facts concerning the truck leasing contracts by virtue of periodic reports of trucking operations, and the directors and stockholders of Knox of Pennsylvania acting through their president, Roy Underwood, authorized such leases and ratified and approved them. (3) After Roy's death in October, 1951, when C. R. Underwood became president of both companies, he decided as a matter of business judgment and

policy not to change the policy which had been set by his brother and to continue to operate these trucks at a tremendous personal profit to himself, his family and his business associates at the expense of the corporation. (4) That the truck leases and rentals were fair and equitable and made in good faith.

The lower court ruled in favor of the petitioners.

On appeal the Supreme Court of Mississippi *reversed* the Chancery Court of the First Judicial District of Hinds County, Mississippi *on both the law and the facts* and decided in favor of respondent. It decided in favor of respondent on both the factual and legal issues involved.

The findings of fact and conclusions of law of the Supreme Court of Mississippi may be summarized as follows:

1. That in making the purported leases between petitioners and respondent, the interested fiduciaries undertook to act both for respondent corporation and themselves, and therefore the leases were voidable at the option of respondent corporation (89 So. 2d 814-816, 818).

2. That the purported lease contracts were *grossly unfair* to respondent; caused it actual injury and drained it of profits in favor of the petitioners who were fiduciaries, their relatives, personal friends and business associates (89 So. 2d 814, 818).

3. The overwhelming weight of the evidence demonstrates not only the unfairness of the leases to respondent corporation, but also that the petitioners who were officers and directors acted in *bad faith* toward respondent corporation to which they owed a high standard of fidelity and responsibility (89 So. 2d 818).

4. That therefore the purported lease contracts were invalid and voidable from their inception (91 So. 2d 843).

5. Where a contract with corporate officers is voidable, the corporation has several available remedies: To hold the officers on the contract according to its terms, to repudiate it and sue to set it aside, or to affirm the contract and hold the officer for profits received.

6. That although the leases were voidable from their inception, at the option of the corporation, under the peculiar circumstances of this case, respondent corporation was estopped from asserting a claim to truck rentals taken prior to the death of R. R. Underwood (89 So. 2d 817; 91 So. 2d 843).

7. That after the death of Roy Underwood, petitioner C. R. Underwood was the president of both the parent corporation and the respondent corporation, and he and the members of his family who were officers and directors were free from the policy previously made by Roy Underwood and that C. R. Underwood and his family having such unrestricted control, clearly had the duty to take such action as would eliminate the large personal profits which were being made by the Underwoods as fiduciaries, the members of their families and their close personal friends and business associates, all at the expense of the respondent corporation, whose interest the fiduciaries were legally and morally bound to uphold and protect (89 So. 2d 818).

8. That the prohibition which forbids a fiduciary from making a profit at the expense of his beneficiary, likewise extends to the wife and other close relatives of the fiduciary (89 So. 2d 818, 819). (Including petitioners Mrs. Florence Underwood, wife of C. R. Underwood, and E. F. Underwood and J. H. Underwood, sons of C. R. Underwood, as individuals and as trustees.)

9. Persons who join a fiduciary in an enterprise where the personal interests of the fiduciary are or may be antagonistic to his fiduciary duty become jointly and severally liable with the fiduciary for the profits of the enterprise (89 So. 2d *819, 842*) (Petitioner C. Alberta Luter).

10. Under the facts of this case and under the applicable legal principles, petitioners are liable to refund to respondent the net profits received by them from and after January 1, 1952.

ARGUMENT.

It is apparent when the brief for petitioner is read in conjunction with the holding of the Mississippi Supreme Court, that petitioners have completely misconceived and thereby confused the issues in this case. The petition consists principally of an argument of the case on the merits, and is chiefly an argument that the decision of the Mississippi Supreme Court is erroneous. *With deference, that is not the issue before this Court.* For this reason, we shall not undertake to reply to the lengthy, involved, and prolix argument contained in the petition. We shall confine ourselves to a discussion which we feel may prove of assistance to this Court in determining whether or not it should exercise its discretionary authority to grant certiorari. Frankly, and with deference, the petition which has been filed in this case is to say the least confusing. When the veil of confusion is lifted it is readily apparent that the petition should be denied.

I. There Is No Federal Question.

The legal principles involved in this case are relatively simple. They are announced in a multitude of judi-

cial decisions by both federal and state courts. It is fundamental and certainly well settled in Mississippi, that officers and directors of a corporation are subject to the general rule which prevails in regard to trusts and trustees that they cannot use the trust property or their relation to it for their own personal gain.

Furthermore, they cannot have or acquire any personal pecuniary interest in conflict with their duty as such trustees.

A director of a corporation occupies a fiduciary relationship so that any of his dealings with his beneficiary are carefully scrutinized by the courts and *"may be set aside on slight grounds."* *Twin-Lick Oil Co.* v. *Marbury,* 91 U. S. 587, 588; *Wardell* v. *Union Pacific Railroad Company,* 103 U. S. 651, 658.

A director or officer cannot use his power for his personal advantage and to the detriment of the corporation *"no matter how absolute in terms that power may be and no matter how meticulous he is to satisfy technical requirements."* *Pepper* v. *Litton,* 308 U. S. 295, 306.

Where there is a violation of the fiduciary duty, *"equity will undo the wrong or intervene to prevent its consummation."* *Pepper* v. *Litton, supra.*

The basic principle which is controlling in this case was well expressed by Mr. Justice Cardozo, while on the New York bench, in the case of *Meinhard* v. *Salmon,* 249 N. Y. 458, 164 N. E. 545, 62 A. L. R. 1, where he said:

> "Many forms of conduct permissible in a workaday world for those acting at arm's length are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard

> of behavior. As to this there has developed a tradition that is unbending and inveterate. *Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions. Wendt* v. *Fischer,* 243 N. Y. 439, 444, 154 N. E. 303. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court."

The legal principles, therefore, are clear.

The facts to which these legal principles are applicable are somewhat complicated. However, the Supreme Court of the State of Mississippi, the highest court of the state, has ruled on the factual issues in this case and has resolved those issues in favor of respondent.

Under the established jurisprudence of Mississippi, the Supreme Court of Mississippi had full authority to pass on such factual issues.

The Mississippi Supreme Court has ruled repeatedly that the Mississippi Constitution invests that Court with full appellate equity jurisdiction, and that in reviewing the record of an equity trial the Supreme Court does so as chancellors, charged with a solemn judicial duty and responsibility. And if according to the Mississippi Supreme Court's view of the facts the Chancery Court was wrong, then it becomes the plain duty of the Mississippi Supreme Court to set aside the decree of the lower court and apply the legal test as the Supreme Court sees it.

Gillis v. *Smith,* 114 Miss. 665, 686, 75 So. 451.

McCarthy v. *Love,* 145 Miss. 330, 341, 110 So. 795.

Puryear v. *Austin,* 205 Miss. 590, 604, 29 So. 2d 257.

Reed v. *Charping,* 207 Miss. 1, 9, 41 So. 2d 11.

Ivey v. *Geisles,* 213 Miss. 212, 214, 56 So. 2d 501.

The Mississippi Supreme Court has full authority to reverse a chancellor and render the decree that in its opinion the lower court should have entered. *Kwong* v. *Board of Levee Commissioners*, 164 Miss. 250, 144 So. 693.

The petitioners' statement of the facts of this case is based almost entirely on the opinion of the Chancery Court. Petitioners largely ignore the fact that the Supreme Court of Mississippi reversed the Chancellor on both the law and the facts. The Mississippi Supreme Court is the highest court of the state and is vested with full and final appellate jurisdiction. The opinion of the Chancery Court—a *nisi prius* court—is therefore immaterial. Likewise petitioners have lifted from a dissenting opinion of one of the Judges of the Supreme Court. There is, of course, but one opinion of the Supreme Court of the State of Mississippi in this case, and that is the majority opinion written by Justice Ethridge and joined in by six of the nine members of the Court. What has been said in a dissenting opinion is, of course, immaterial.

And it is fundamental that this Supreme Court will not exert its jurisdiction merely to review a decision of a state court upon a question of fact.

It is submitted, therefore, that the Mississippi Supreme Court has resolved the questions of fact in favor of respondent and has correctly applied the pertinent and controlling legal principles. The majority opinion of the Supreme Court of Mississippi contains an exhaustive and scholarly analysis of the governing law.

But even if this Court were of the opinion that the decision of the Mississippi Supreme Court was erroneous, still that would furnish no basis whatsoever for the exercise of this Court's certiorari jurisdiction. This Court is not primarily concerned with the mere correction of error.

Address of Chief Justice Vinson before American Bar Association, September 7, 1949.

This Court will never grant a review on writ of certiorari unless a state court has decided a federal question of substance not therefore determined by this Court or has decided it in a way probably not in accord with applicable decisions of this Court. *Supreme Court Rule 19.*

There is no federal question whatsoever in this case.

This case does not involve any federal treaty or statute. It does not involve the validity of any state statute.

That here involved is solely and alone the equity jurisprudence of the State of Mississippi to determine whether the directors and officers of a Mississippi corporation, who are residents of the State of Mississippi, have wrongfully taken money from the corporation in violation of their clear fiduciary duty.

It cannot be seriously contended that the courts of the State of Mississippi do not have full jurisdiction and authority to determine the validity or invalidity, or the voidability of a contract made in Mississippi, by and between a Mississippi corporation and its directors and officers, who are residents of the State of Mississippi and to adjudicate the right to recover money which such directors and officers wrongfully took in the State of Mississippi in violation of their fiduciary duty.

The doctrine that federal courts follow state law applies in actions in equity as well as suits at law. *Ruhlin* v. *New York Life Insurance Company*, 302 U. S. 202, 205, where the Court said:

> "The decision in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, *ante*, 1188, 58 S. Ct. 817, 114 A. L. R. 1487, No. 367, decided April 25, 1938, goes further, and settles the

question of power. The subject is now to be governed, even in the absence of state statute, by the decisions of the appropriate state court. The doctrine applies though the question of construction arises not in an action at law, *but in a suit in equity.*"

See also *Guaranty Trust Company* v. *York,* 326 U. S. 99, 107.

It cannot be doubted, therefore, that the State of Mississippi had plenary power over this litigation which was to enforce the fiduciary liability of directors and officers. *Cohen* v. *Beneficial Industrial Loan Corporation,* 337 U. S. 541, 549, where the Court said:

"The very nature of the stockholder's derivative action makes it one in the regulation of which the legislature of a state has wide powers. Whatever theory one may hold as to the nature of the corporate entity, it remains a wholly artificial creation whose internal relations between management and stockholders are dependent upon *state law* and may be subject to most complete and penetrating regulation, either by public authority or by some form of stockholder action. *Directors and managers, if not technically trustees, occupy positions of a fiduciary nature, and nothing in the Federal Constitution prohibits a state from imposing on them the strictest measure of responsibility, liability and accountability, either as a condition of assuming office or as a consequence of holding it.*"

The assertion that the effect of the decision of the Mississippi Supreme Court is to limit the right of petitioners or of any person to contract is pure fiction. The decision has had no such effect and is not susceptible of any such construction. What the Court has held and all the Mississippi Court has held is that an officer and director of a corporation in this state cannot take and retain profits from the corporation he is supposed to represent arising

from a transaction wherein the officer or director has represented both himself and the corporation, and the corporation has not been represented by disinterested parties—and particularly, as the Court has said, when the transaction involved is grossly unfair to the corporation and was entered into in bad faith on the part of the fiduciary.

Counsel for petitioners feign astonishment that three individuals, *i. e.*, Smith, Patten and DeViney, each of whom leased a truck to respondent corporation during the period in question, were not joined as defendants in the present suit, and that one, Hester, who was a defendant, was held not liable by the Supreme Court. It is apparently contended that these facts in some manner sustained the validity of the lease contracts as a predicate for recovery, and this invaded some right of petitioners. *Such a contention is wholly without merit.* It is immediately obvious why Smith, Patten and DeViney were not joined as defendants in the suit. Petitioners were sued for the breach of a fiduciary duty. These persons, Smith *et al.*, were not officers or directors of respondent corporation during any of the period involved and no fiduciary relation existed between these persons and respondent corporation. These persons did not represent both themselves and respondent corporation in the negotiation or continuation of their lease contracts or at any time while the same were in operation. And as to Hester; it was sought to hold Hester liable on account of his relationship with petitioners or some of them. In this effort respondent failed. As to Hester the Mississippi Court said "Hester was never an officer or director in complainant and did not occupy any fiduciary relationship to it. For that reason, and because the evidence fails to show that he *knowingly* colluded with the Underwood officers and directors in the violation of their fiduciary duties, a majority of the judges • • •

are of the opinion and the Court holds, that complainant has no right of recovery for truck rentals received by Hester." Thus under the facts Smith, Patten and DeViney were in an entirely different category from petitioners, and under the facts as found by the Supreme Court, Hester was placed in an entirely different factual category.

Since the decision of the Supreme Court of Mississippi rests entirely upon a matter of state law, which is not only adequate but exclusive, there is not the slightest ground upon which to invoke the certiorari jurisdiction of this Court.

In this brief we have not undertaken to discuss with particularity the cases cited in the lengthy brief of petitioners. We have not deemed it necessary so to do, and have considered that such a discussion would be impertinent to the issue before this Court. Suffice it to say that we have studied the cases, and we confidently submit that despite the lengthy and prolix argument of petitioners, they have not cited one single case which in any way deals with the issue now before this Court or which in any degree even tends to justify the exercise of this Court's certiorari jurisdiction.

It is respectfully submitted that the decision in this case involves purely and simply a question of state law—that is the liability of fiduciaries who wrongfully and in breach of their duty take corporate money and appropriate it to the benefit of themselves, their families and confederates.

While this Court is not primarily concerned with the correctness of the decision of the Supreme Court of Mississippi, it is submitted that the holding of the Mississippi Supreme Court is clearly correct. Much of petitioners' argument is a captious effort to flyspeck the opinion.

The present case involves an extreme and aggravated situation. The defendant fiduciaries and their confederates bought trucks and then rented them to respondent. In so doing they represented both themselves and the corporation. The corporation was not otherwise represented. The proof shows without dispute that the net profits taken from respondent by petitioners while acting as fiduciaries were sufficient to pay for the trucks in from five to ten months. By means of these leases, the petitioners while acting as fiduciaries have taken *Knox's own money* to *buy* the trucks, and in addition have taken large personal profits out of these direct dealings with the respondent.

These truck leases were not executed contracts nor liquidated demands but were executory leases continuing day in and day out. The rental payments made to the petitioners after deduction of operating expenses have more than reimbursed petitioners for the money they expended for the purchase of trucks, and the petitioners have been repaid many times over. Petitioners have taken from respondent the cost of the trucks over and over again.

The truck leases were cancellable on thirty days notice. By continuing the leases and not cancelling them, the defendant fiduciaries, in effect, *renewed* the leases every thirty days. Each and every day that the truck leases were continued in effect respondent was being deprived of money which could have been saved for it by proper effort on the part of petitioners. Respondent's money was being taken daily by these petitioners who were under a fiduciary obligation to protect and safeguard the interests of respondent.

Consider these undisputed facts.

The truck leasing arrangements between the respondent company and the petitioners began in 1948 and con-

tinued until the new management took over near the end of 1953. Throughout this time new units were added with increasing frequency and new leases were executed, all, or practically all, with the petitioners. Throughout this time each and every unit was making enormous net profits for the petitioners at the expense of respondent corporation. These profits are shown without dispute to have been in excess of 100% return on investment per annum (R. 3717) and in one instance more than 783% over a period of less than five years (R. 3720). Throughout the period these leases were cancellable on thirty days notice.

These petitioners knew of these facts, not only by reason of their positions as management of respondent corporation, but they themselves actually owned the trucking units and themselves received these net profits.

Notwithstanding these facts, petitioners, who were the managing officers and directors of respondent corporation and who were at all times legally and morally bound to protect the interests of the company, sat on the witness stand and blandly admitted that they never at any time made the slightest effort to make a better deal for the company with any of these lessors or to negotiate a lease more favorable to the company when new units were put on and new leases entered into (R. 690, 2614, 2615). No effort was made to cause any outside person to become interested in leasing equipment to the company on a competitive basis.

In the present case it cannot be questioned that the petitioners, who were fiduciaries, placed themselves in a position in which they were tempted by their own personal interests to disregard that of the corporation. It is perfectly clear that they yielded to that temptation.

Thus there has been a breach of the fiduciary duty owed by these petitioners who were managing officers and directors of respondent corporation—a breach of the strict rule of undivided loyalty—an obvious example of the reason for the rule and the strictness of the rule.

In such a case the law is clear. These petitioners, the managing officers and directors of respondent corporation, and those confederating with and standing in close relationship with such officers and directors, who have taken enormous profits from their direct dealings with the respondent company will not be permitted to retain such profits.

The decision of the Mississippi Supreme Court is clearly correct. In any event, there is no federal question involved.

II. No Federal Question Was Properly Raised in or Decided by the State Court.

As pointed out above, there is no federal question involved in this case. Even if this case did involve a federal question—which it does not—such alleged federal question was not timely and properly raised and was not passed on by the Supreme Court of Mississippi.

It is essential to the jurisdiction of the Supreme Court under *Section 1257 of 28 U. S. C.* that a substantial federal question have been properly raised and actually decided in the state court proceedings. While no particular form of words or phrases is required to present a federal question to the state court, it is essential that the litigant bring the federal claim and the ground therefor to the state court's attention with fair precision. *Rule 23, paragraph 1 (f)* of this Court constitutes an express recognition of this principle.

It is obvious from the foregoing discussion that no federal question was necessary to the determination of the present case and that no federal question was involved in the decision of the Supreme Court of the State of Mississippi. All of the parties to this litigation well knew throughout the entire course of the lengthy litigation, that the only question involved was one of the law of the State of Mississippi. There is no hint or intimation in any of the pleadings in the trial court or the original briefs in the Mississippi Supreme Court even remotely suggesting the existence of a federal question in the case.

The first and only time that any federal question has been even suggested is found in the claims by petitioners on Suggestions of Error, which were all filed subsequent to the rendition of the opinion of the Supreme Court of the State of Mississippi.

Petitioners' counsel recognize the fact that the federal question was not properly and timely raised and in the petition (pages 18-21) engage in a strenuous effort to show that the alleged federal questions were properly raised. It is admitted in the petition that the first time any federal question was even suggested in this case was in the Suggestions of Error. A Suggestion of Error is the Mississippi equivalent of the petition for rehearing used in other states. *Provident Life and Accident Insurance Company* v. *Jemison*, 120 So. 836, 153 Miss. 60, 62.

Raising an alleged federal question for the first time in a suggestion of error or petition for rehearing comes too late unless the court actually entertains the question and decides it. *Herndon* v. *Georgia*, 295 U. S. 441, 443.

The Mississippi Supreme Court did not rule on any alleged federal question raised in the Suggestions of Error, but merely reaffirmed its holding that the lease contracts

were invalid and voidable from their inception, 91 So. 2d 843).

The Mississippi Supreme Court in overruling the Suggestions of Error said:

> "The majority of the Court *did not consider*, and *did not hold*, the leases valid prior to the death of Roy Underwood."

The only attempted justification which petitioners offer to support their contention that the federal question was properly and timely raised is that the decision of the Mississippi Supreme Court constituted a "surprise" to them, that it was unexpected, and that petitioners had no prior opportunity to anticipate or assert the alleged federal question, relying upon such cases as *Brinkerhoff-Faris Trust Company* v. *Hill*, 281 U. S. 673.

With due deference to eminent counsel for petitioners, there is no merit whatsoever in the contention that the Supreme Court decision was unexpected or constituted a surprise. An adverse decision is usually a surprise to the advocate involved, but this is in no sense a "legal surprise."

The whole point is whether the ruling of the Mississippi Supreme Court *"should have been anticipated."* *Herndon* v. *Georgia*, 295 U. S. 441, 443.

If the ruling of the Mississippi Supreme Court could or should have been anticipated by petitioners, then it was incumbent upon petitioners to raise the alleged federal questions in an orderly manner at the proper time and not wait until the filing of a Suggestion of Error after the Supreme Court had decided the case.

It is perfectly obvious, and the petitioners and their counsel are bound to have known from the moment this lawsuit was filed, that if respondent prevailed and any

relief whatsoever was granted respondent by the courts, then of necessity, petitioners would be compelled to make restitution to the extent of the relief granted, and all of the questions which they now seek to assert, would inevitably have been involved. Had petitioners been at all realistic and recognized the possibility of respondent prevailing in this suit, then they must have known that that which was held by the Court would have been held. This was the inevitable result.

It is earnestly submitted, therefore, that petitioners knew at all times that any alleged federal question now asserted would necessarily be involved in any decision of the courts in favor of respondent.

Therefore, the alleged federal questions were not properly raised nor raised in time, and the certiorari jurisdiction of this Court cannot attach.

III. The Judgment of the Mississippi Supreme Court Does Not Possess the Requisite Finality.

In order to invoke the jurisdiction of this Court, the statute (*28 U. S. C., Section 1257*) requires that there be a "final" judgment or decree by the highest state court. In order for a state court judgment to be final within the meaning of the statute, it must be final as to all parties and issues. Definitive disposition must be made of all the legal and factual issues in the case. Thus the requirement of finality has not been met merely because the major issues in a case have been decided and only a few loose ends remain to be tied up. A typical example is a case in which liability has been determined, and all that needs to be adjudicated is the amount of damages. *Republic Natural Gas Company* v. *Oklahoma*, 334 U. S. 62, 68.

In the present case the Supreme Court of Mississippi adjudicated the question of liability, but remanded the case to the Chancery Court to hear evidence and ascertain and fix the amount of recovery to be allowed respondent.

Such a judgment is not final within the meaning of the statute. The settled rule is that if the State Supreme Court makes a decree fixing the liability and rights of the parties, and refers or remands the case to a subordinate court for a judicial purpose such as a statement of account, upon which a further decree is to be entered, the decree is not final. *California National Bank* v. *Stateler*, 171 U. S. 447. This case does not involve a direction of the immediate transfer of physical property such as was involved in *Radio Station WOW* v. *Johnson*, 320 U. S. 120, and similar cases relied upon by petitioners (Petition pp. 21, 22).

The fact that the cross-bills of petitioners were dismissed by the Supreme Court does not alter the situation. It is settled that a judgment dismissing a cross-bill concerning the same subject matter as the bill of complaint is not final if the complaint has not received a conclusive determination.

Bowker v. *United States*, 186 U. S. 135.

For this additional reason the petition should be denied.

IV. This Court Should Not Stay the Mandate of the Supreme Court of Mississippi.

On page 69 of the petition, petitioners move this Court for an order staying the issuance of a mandate by the Supreme Court of the State of Mississippi. This motion should be denied.

A motion to stay the mandate was filed in the Supreme Court of Mississippi. Briefs were filed by all

parties, and after consideration thereof, the Mississippi Supreme Court denied the motion.

It is respectfully submitted that considerable weight attaches to the action of the Mississippi Supreme Court in refusing to stay the mandate, and that in the absence of an extraordinary showing to the contrary, its action should be upheld by this Court.

Magnum v. *Coty*, 262 U. S. 159, 164.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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CHARLES B. SNOW,
900 Milner Building,
Jackson, Mississippi,

_____,

JUNIOR O'MARA,
900 Milner Building,
Jackson, Mississippi,
Counsel for Respondents.

BUTLER, SNOW, O'MARA, STEVENS & CANNADA,
Of Counsel.

CERTIFICATE OF SERVICE.

I, Charles B. Snow, attorney of record for respondents, hereby certify that I have this day delivered to Honorable Garner W. Green, Sr., and Honorable William Harold Cox, counsel of record for petitioners, both of Jackson, Mississippi, a true and correct copy of the above brief in opposition.

This the ..... day of May, 1957.

_____,

CHARLES B. SNOW.